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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ORACLE AMERICA, INC.,)	<u>REDACTED</u>
)	
PLAINTIFF,)	NO. C-10-3561 WHA (DMR)
)	
VS.)	THURSDAY, JANUARY 14, 2016
)	
GOOGLE, INC.,)	OAKLAND, CALIFORNIA
)	
)	JOINT DISCOVERY LETTER BRIEF
DEFENDANT.)	
_____)	

BEFORE THE HONORABLE DONNA M. RYU, MAGISTRATE JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF: ORRICK, HERRINGTON & SUTCLIFFE LLP
405 HOWARD STREET
SAN FRANCISCO, CALIFORNIA 94105
BY: ANNETTE L. HURST, ESQUIRE
ROBERT L. URIARTE, ESQUIRE
ANDREW KIM, ESQUIRE

FOR DEFENDANT: KEKER & VAN NEST
633 BATTERY STREET
SAN FRANCISCO, CALIFORNIA 94111
BY: ROBERT VAN NEST, ESQUIRE
STEVEN P. RAGLAND, ESQUIRE
MAYA KARWANDE, ESQUIRE

REPORTED BY: DIANE E. SKILLMAN, CSR 4909, RPR, FCRR
OFFICIAL COURT REPORTER

TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

1 THURSDAY, JANUARY 14, 2016

11:57 A..M.

2 P R O C E E D I N G S

3 **THE CLERK:** CALLING CIVIL 10-3561 WHA ORACLE AMERICA,
4 INCORPORATED VERSUS GOOGLE, INCORPORATED.

5 PLEASE STATE YOUR APPEARANCES, COUNSEL.

6 **MS. HURST:** GOOD MORNING, YOUR HONOR. ANNETTE HURST
7 FOR ORACLE. AND WITH ME TODAY ARE ROBERT URIARTE AND ANDREW
8 KIM.

9 **THE COURT:** GOOD MORNING.

10 **MR. VAN NEST:** GOOD MORNING, YOUR HONOR. BOB VAN
11 NEST OF KEKER & VAN NEST FOR GOOGLE. AND I'M HERE WITH STEVEN
12 RAGLAND AND MAYA KARWANDE.

13 **THE COURT:** GOOD MORNING.

14 I THINK A FEW MORE OF YOU SHOWED UP THAN CHECKED IN.
15 LET'S MAKE SURE MS. GARCIA HAS ALL OF YOUR APPEARANCES,
16 MR. VAN NEST.

17 **MR. VAN NEST:** I THINK SHE HAS A BUSINESS CARD FROM
18 MR. RAGLAND AND A BUSINESS CARD FROM MS. KARWANDE.

19 **MS. HURST:** I THINK IT'S MY FAULT, YOUR HONOR.
20 MR. KIM DID NOT CHECK IN AND HE'S NOT PLANNING TO APPEAR.
21 HE'S WITH US THIS MORNING.

22 **THE COURT:** OKAY. GOOD MORNING, EVERYONE. WE ARE
23 HERE ON ORACLE'S DISCOVERY MOTION.

24 MS. HURST, I'M GOING TO SUMMARIZE WHAT I THINK ORACLE'S
25 ARGUMENT IS ON RELEVANCE TO DAMAGES. YOU TELL ME IF I'VE GOT

1 IT RIGHT.

2 ORACLE BELIEVES THAT GOOGLE'S SEARCH DISTRIBUTION
3 AGREEMENTS WITH THIRD PARTIES IS RELEVANT TO ORACLE'S DAMAGE
4 ANALYSIS BECAUSE ORACLE WANTS TO USE THAT INFORMATION TO
5 DEVELOP THE HYPOTHETICAL LICENSE NEGOTIATION MODEL WITH
6 RESPECT TO AN INPUT AROUND THE VALUE TO GOOGLE OF CONTROL OF
7 THE ANDROID PLATFORM.

8 SO ORACLE SAYS CONTROL OF THE ANDROID PLATFORM WAS VERY
9 VALUABLE TO GOOGLE. AND ONE WAY WE CAN GET AT THAT VALUE FOR
10 PURPOSES OF PLUGGING INTO THE NEGOTIATION IS TO LOOK AT THE
11 DEALS THAT GOOGLE WAS ENTERING INTO NON -- WITH NON-ANDROID
12 PLATFORMS WHERE THEY HAD TO SHARE REVENUE OR OTHER FORMS OF
13 COMPENSATION.

14 IS THAT BASICALLY WHAT THE ARGUMENT IS?

15 **MS. HURST:** THAT IS ONE OF OUR ARGUMENTS, YOUR HONOR.
16 THAT THEORY RELATES ALSO TO APPORTIONMENT OF PROFITS AND HOW
17 TO VALUE THE ROLE THE PLATFORM PLAYS IN APPORTIONMENT.

18 AND, YOUR HONOR, WE ALSO HAVE OTHER RELEVANT THEORIES
19 RELATED TO THE FIRST FACTOR OF FAIR USE AND DISGORGEMENT
20 CAUSATION IN GENERAL.

21 **THE COURT:** WE WILL GET TO THAT IN A MOMENT, BUT I
22 WANTED TO MAKE SURE I UNDERSTOOD THE DAMAGE ANALYSIS.

23 **MS. HURST:** YES.

24 **THE COURT:** EXPLAIN HOW THIS WOULD PLAY INTO
25 APPORTIONMENT OF PROFITS.

1 **MS. HURST:** YOUR HONOR, WHAT THE 37 JAVA API'S
2 ENABLED GOOGLE TO DO WAS TO CREATE THE ANDROID PLATFORM. AND
3 IT ENABLED GOOGLE TO DO THAT AT A VERY SPECIFIC MOMENT IN
4 TIME, WHICH WAS A CRITICAL WINDOW OF OPPORTUNITY FOR GOOGLE.

5 THE CONSUMERS WERE CONVERGING ON THE MOBILE MARKET AND
6 THEY WERE IN A SPACE RACE WITH APPLE. THEY WERE LITERALLY
7 NECK IN NECK WITH THE IOS PLATFORM COMING OUT.

8 NOW, WHAT WE NEED TO DO IN APPORTIONING PROFITS IS TO
9 UNDERSTAND OF ALL THE PROFITS THAT THEY MADE ASSOCIATED WITH
10 ANDROID SINCE IT WAS RELEASED, A FIGURE WHICH WE THINK IS
11 XX
12 XX
13 VALUE OF THE PLATFORM AND CORRESPONDINGLY THEN TO THE API'S

14 THEY ARE ON GOING TO COME AND SAY, WELL, ALL THAT PROFIT
15 IS REALLY, YOU KNOW, GOOGLE'S BRAND, IT'S THIS, IT'S THAT,
16 IT'S ALL THESE OTHER FACTORS. AND WE NEED TO RESPOND TO THAT
17 AND WE NEED TO HAVE A GOOD RESPONSE TO THAT. WE RECOGNIZE
18 THAT.

19 SO WHAT, JUST TAKING APPLE AS AN EXTENDED ANALOGY, YOUR
20 HONOR, WHAT THAT LETS US SHOW IS, WHEN GOOGLE HAS TO GO PAY
21 FOR SEARCH, AND LET'S JUST TAKE IT ON A PER DEVICE BASIS, YOUR
22 HONOR. LET'S SAY ON A PER IOS DEVICE BASIS, THEY'RE EARNING
23 \$8 A DEVICE. THIS IS JUST HYPOTHETICAL. I AM MAKING IT UP
24 FOR PURPOSES OF DISCUSSION.

25 AND THEY ARE PAYING APPLE \$1 OR \$2. PROBABLY, LET'S SAY

1 \$2. THEN WHAT WE KNOW IS THE VALUE OF ACCESS TO THE PLATFORM,
2 THE PLATFORM IS GIVING THEM A QUARTER OF THE VALUE. THAT
3 ABILITY TO ACCESS IS GIVING THEM A QUARTER OF THE VALUE.

4 **THE COURT:** OKAY. SO THIS WOULD WEIGH INTO THE
5 APPORTIONMENT OF PROFITS AT THE VALUATION OF THE PLATFORM
6 LEVEL.

7 **MS. HURST:** EXACTLY.

8 **THE COURT:** NOT AT THE VALUATION OF THE API'S.

9 **MS. HURST:** RIGHT. AND THERE MAY NOT BE A LOT OF
10 DAYLIGHT THERE WHEN YOU LOOK AT ALL THE CIRCUMSTANCES.

11 **THE COURT:** OKAY.

12 **MS. HURST:** AND THE ROLE THAT THIS WAS THE LAST
13 CRITICAL PIECE, YOU KNOW, THE LAST INCH OF THE LAST MILE OF
14 DELIVERY TO THE CUSTOMERS.

15 BUT IN ANY EVENT, IT'S A GOOD ANALOG FOR VALUING THE
16 PLATFORM PIECE.

17 **THE COURT:** YOU ALSO RAISED THE FAIR USE ISSUE. WHAT
18 IS THE RELEVANCE TO FAIR USE?

19 **MS. HURST:** SO, YOUR HONOR, THE FAIR USE FIRST FACTOR
20 IS THE ONE I'M GOING TO FOCUS ON. THE PURPOSE AND CHARACTER
21 OF THE USE.

22 **THE COURT:** I THINK WE ALL KNOW IT'S COMMERCIAL.

23 **MS. HURST:** WELL, WE ASSUME THAT, BUT THEY ARE
24 FIGHTING IT. AND I HAVE HAD WITNESS AFTER WITNESS COME TO
25 DEPOSITION, YOUR HONOR, AND SAY, OH, I DON'T KNOW HOW WE MAKE

1 MONEY FROM ANDROID. WE DON'T MAKE ANY MONEY FROM ANDROID.
2 OUR PURPOSE IN CREATING ANDROID WAS TO DELIGHT THE WORLD'S
3 CONSUMERS AND TO BRING THE INTERNET TO THE WORLD. WITNESS
4 AFTER WITNESS, YOUR HONOR.

5 AND EVEN IF THEY WEREN'T FIGHTING THE FACT OF
6 COMMERCIALITY, THE THING ABOUT THE FAIR USE ANALYSIS IS THAT
7 IT IS A BALANCING ANALYSIS. AND ON THE FIRST FACTOR, THERE
8 ARE TWO SEPARATE INQUIRIES.

9 AND FOR A MOMENT, YOUR HONOR, IF YOU WILL INDULGE ME, I
10 WILL TALK ABOUT INTRA FACTOR BALANCING, JUST BALANCING THE
11 DIFFERENT ASPECTS OF THE FIRST FACTOR.

12 THEY WANT TO COME AND SAY, WELL, THE CHARACTER OF THE USE
13 DOMINATES THE JURY'S INQUIRY. IT'S TRANSFORMATIVE. SUN
14 SCREWED UP. THEY NEVER COULD HAVE MADE THIS. WE WILL HAVE
15 LOTS OF EVIDENCE TO THE CONTRARY, BUT IN ANY EVENT, THEY WANT
16 TO SAY THE TRANSFORMATIVE NATURE SHOULD PREDOMINATE IN THE
17 JURY'S INTRA FACTOR BALANCING OF THE FIRST FACTOR.

18 WE WANT TO SAY, LOOK AT THE EXTRAORDINARY MAGNITUDE OF
19 XX
20 IN PROFIT. AND, FOR PURPOSES OF THIS VERY SPECIFIC
21 DISCUSSION, THE KNOWLEDGE THAT IT CANNOT BE EXCLUDED, CANNOT
22 BE LOCKED OUT FROM THE WORLD'S MOBILE CONSUMERS.

23 AND THAT'S WHAT WE ARE REALLY TALKING ABOUT HERE. THIS
24 WAS A COMMERCIAL PURPOSE IN THE ABSOLUTELY TRADITIONAL SENSE
25 OF COMMERCIAL; DISTRIBUTION, YOUR HONOR.

1 BECAUSE GOOGLE IS AN ADVERTISING COMPANY. IT'S NOT A JET
2 PACK COMPANY OR A SPACE ELEVATOR COMPANY OR A DRIVERLESS CAR
3 COMPANY. IT SELLS ADVERTISING. AND THE CONTENT IT DELIVERS
4 TO GET PEOPLE TO PARTICIPATE IN THAT ADVERTISING MARKET IS ITS
5 SEARCH SERVICES. THERE ARE OTHERS, MAPS AND THE LIKE, BUT
6 PRIMARILY IT'S SEARCH SERVICES. GOOGLE HAS TO BE ABLE TO
7 DELIVER THAT CONTENT TO SELL THE ADVERTISING. THAT IS A CORE
8 COMMERCIAL PURPOSE OF GOOGLE.

9 AND WHAT ANDROID ENABLED IT TO DO AND WHAT THOSE 37 JAVA
10 API'S ENABLED IT TO DO, BECAUSE AS YOU WILL RECALL,
11 MR. LINDHOLM SAID SO SUCCINCTLY, THE ALTERNATIVES ALL SUCK.
12 WHAT THOSE 37 JAVA API'S ENABLED AT THAT SPECIFIC MOMENT IN
13 TIME WHEN IT WAS A SPACE RACE WITH APPLE WAS THE KNOWLEDGE
14 THAT THEY COULD NOT BE LOCKED OUT BY MICROSOFT, FACEBOOK,
15 YAHOO, AND APPLE, AND THAT THEY WOULD BE ABLE TO DELIVER THEIR
16 CORE BUSINESS, SEARCH SERVICES AND THE ADVERTISING ASSOCIATED
17 WITH IT.

18 THIS IS A COMPELLING COMMERCIAL PURPOSE. IT IS NOT, WE
19 WANT TO DELIGHT THE WORLD'S USERS. IT IS NOT, OH, WE'RE JUST
20 A TECHNOLOGY COMPANY, DON'T BE EVIL. IT IS, WE ARE EARNING
21 BILLIONS AND BILLIONS AND BILLIONS OF DOLLARS AND WE DON'T
22 WANT TO PAY SUN AND LATER ORACLE A SINGLE PENNY OF THAT.
23 DESPITE THAT ENORMOUS COMMERCIAL PURPOSE, OH, LOOK, WE WERE
24 TRANSFORMATIVE, WE SHOULD WIN ON FAIR USE.

25 THE JURY IS ENTITLED TO MAKE THAT RELATIVE COMPARISON,

1 YOUR HONOR.

2 **THE COURT:** WHAT PERIOD OF TIME IS COVERED BY YOUR
3 DISCOVERY REQUEST?

4 **MS. HURST:** YOUR HONOR, IT IS NOT LIMITED ON ITS
5 FACE, BUT I WOULD LIMIT IT. I WOULD OFFER TO LIMIT IT IN THE
6 FOLLOWING WAYS.

7 I WOULD OFFER TO LIMIT IT TO AGREEMENTS FOR THE PAYMENT,
8 REVENUE SHARING IS PROBABLY THE BETTER TERM HERE, PAYMENTS
9 ASSOCIATED WITH THE DISTRIBUTION OF GOOGLE'S SEARCH SERVICES
10 ON NON-ANDROID MOBILE PLATFORMS.

11 THAT IS MOST CONSISTENT WITH BOTH OUR FAIR USE AND OUR
12 TIMING WINDOW OF DAMAGES THEORIES AS THEY HAVE BEEN DEVELOPED
13 IN THE CASE.

14 **THE COURT:** HOW DOES THAT TRANSLATE INTO A TEMPORAL
15 SCOPE. AM I MISSING SOMETHING?

16 **MS. HURST:** WELL, YOUR HONOR, THERE WERE MOBILE
17 PLATFORMS BEFORE ANDROID AND IOS. SO IT WOULD GO ALL THE WAY
18 BACK TO WHATEVER THAT FIRST AGREEMENT WOULD BE WHERE THEY
19 MIGHT HAVE BEEN PAYING VERIZON TO GET A SEARCH APP ON A
20 VERIZON FEATURE PHONE.

21 I DON'T KNOW EXACTLY WHAT IT WOULD BE IN REALITY BASED ON
22 THAT REQUEST, BUT IT WOULD PROBABLY BE SOMETIME IN THE 2003 TO
23 2004 TIME PERIOD WOULD BE MY SUSPICION.

24 **THE COURT:** WHY WOULD IT BE JUST FOR NON-MOBILE? AM
25 I MISSING SOMETHING?

1 **MS. HURST:** I SAID MOBILE NON-ANDROID, YOUR HONOR.

2 **THE COURT:** THANK YOU. MOBILE NON-ANDROID. THAT
3 MAKES SENSE.

4 SO GOOGLE HAS OBJECTED ON A NUMBER OF GROUNDS. ONE OF
5 THEM IS THAT ORACLE DOESN'T NEED INFORMATION ABOUT NON-MOBILE,
6 AND IT SOUNDS LIKE YOU AGREE WITH THAT.

7 **MS. HURST:** I WILL, FOR PURPOSES OF GETTING THIS
8 DONE, YOUR HONOR, WE'LL LIMIT IT TO MOBILE.

9 **THE COURT:** OKAY. LET'S FOCUS ON TEMPORAL SCOPE.
10 AND LET'S TALK ABOUT THE HYPOTHETICAL LICENSE. WHY DOES
11 ORACLE NEED ANYTHING AFTER 2006?

12 **MS. HURST:** WELL, YOUR HONOR, THIS IS NOT A PATENT
13 CASE. SO THAT'S THE FIRST THING I WANT TO SAY. AND I WANT TO
14 SAY IT VERY STRONGLY. THIS IS NOT A REASONABLE ROYALTY
15 HYPOTHETICAL NEGOTIATION. IT IS A FAIR MARKET VALUATION.

16 AND A FAIR MARKET VALUATION IS NOT CONDUCTED BY, AS IN THE
17 REASONABLE ROYALTY ANALYSIS OF PATENT, PICKING SOME BENCHMARK
18 THAT'S AT A SPECIFIC POINT IN TIME WHEN THE INFRINGEMENT
19 ENSUES AND THEN, YOU KNOW, DEVIATING FROM THAT SPECIFIC
20 BENCHMARK BASED ON 22 *GEORGIA-PACIFIC* FACTORS. THAT'S NOT
21 SUPPOSED TO BE WHAT HAPPENS HERE.

22 INSTEAD, THE FAIR MARKET VALUATION CONSIDERS BOTH THE
23 VALUE OF THE COPYRIGHTED WORK AND THE VALUE OF THE USE. AND
24 THE VALUE OF THE USE, YOUR HONOR, STRETCHES OUT OVER TIME.
25 THAT, AND IT IS ALLOWED TO, WHEN YOU'RE DOING A FAIR MARKET

1 VALUATION, CONSIDER VALUATION OVER TIME.

2 **THE COURT:** ARE YOU SAYING THAT THERE WILL BE NO
3 HYPOTHETICAL NEGOTIATION OF A LICENSE? THIS IS AN ENTIRELY
4 DIFFERENT --

5 **MS. HURST:** THAT IS WHAT I AM SAYING, YOUR HONOR,
6 YES.

7 **THE COURT:** WHAT AUTHORITIES ARE YOU USING TO --
8 (SIMULTANEOUS COLLOQUY.)

9 **MS. HURST:** YOUR HONOR, I WOULD SAY THE *SAP* AND
10 *ORACLE* CASE IN THE NINTH CIRCUIT. THE *K2* AND *JARVIS* CASE IS
11 PROBABLY THE ONE BEFORE *ORACLE* AND *SAP* THAT IS THE BEST
12 ARTICULATION OF THIS. IT TALKS ABOUT THE OBJECTIVE NATURE OF
13 THE FAIR MARKET VALUATION APPROACH AND HOW IT LOOKED AT A LOT
14 OF OTHER AGREEMENTS BETWEEN THE PARTIES AND OTHER AGREEMENTS
15 THAT THE PLAINTIFF HAD IN THE INDUSTRY AT VARIOUS TIMES.

16 YOUR HONOR, IT'S KIND OF LIKE A REAL ESTATE THING IN A
17 CERTAIN WAY. YOU PICK A WHOLE BUNCH OF COMPS AND YOU CAN ALSO
18 LOOK AT STRUCTURES OF TRANSACTIONS LIKE IS THIS LIKE A
19 SUBLICENSING APPROACH AND WHAT ARE THE PERCENTAGES ASSOCIATED
20 WITH THIS.

21 THERE ARE A VARIETY OF DIFFERENT WAYS OF GOING AT FAIR
22 MARKET VALUATION. IT IS NOT THE SAME THING AS A PATENT
23 REASONABLE ROYALTY *GEORGIA-PACIFIC* ANALYSIS.

24 **THE COURT:** YOUR CLIENT'S VALUATION WILL THEN NOT
25 FOCUS ON A PARTICULAR POINT IN TIME. IS THAT FAIR TO SAY?

1 **MS. HURST:** YOUR HONOR, SO WE DON'T HAVE THIS DATA.
2 AND TO DATE, YOU KNOW, OUR DAMAGES EXPERT HAS NOT YET OFFERED
3 A HYPOTHETICAL LICENSE APPROACH BECAUSE THEY DON'T WANT TO
4 FINALIZE AN ANALYSIS UNTIL THEY HAVE ALL THE DATA.

5 AND THAT'S PART OF THE PROBLEM WITH THE FAIR MARKET
6 VALUATION IS THAT IT'S DIFFICULT TO DECIDE WHAT'S THE BEST
7 APPROACH UNTIL YOU HAVE ALL THE DATA.

8 SO WE ARE KIND OF STUCK IN LIMBO RIGHT NOW. I DON'T WANT
9 TO REPRESENT TO THE COURT SOMETHING MORE THAT'S GOING TO
10 HAPPEN IN TRUTH WHEN I DON'T KNOW THE ANSWER TO THAT, BUT THAT
11 IS THE EXPECTED APPROACH. IT'S TO -- THEY ARE LOOKING AT
12 SUBLICENSING APPROACHES. THEY ARE LOOKING AT RELATIVE
13 PLATFORM VALUATION APPROACHES.

14 I WOULD SAY THIS TO DISTILL IT DOWN, YOUR HONOR. THE
15 HYPOTHETICAL LICENSE AND COPYRIGHT AS A FAIR MARKET VALUE
16 APPROACH IS PROBABLY MORE APPROXIMATE TO THE APPORTIONMENT
17 PIECE OF THE PROFITS THAN IT IS TO WHAT YOU WOULD THINK OF IN
18 A PATENT CASE.

19 **THE COURT:** OKAY.

20 IF I AM HEARING YOU CORRECTLY, I THINK -- WELL, LET ME PUT
21 THIS IN CONTEXT. GOOGLE IS OBJECTING TO THIS, TO ANYTHING
22 PAST 2006 BECAUSE THEY ARE ARGUING THAT FOR VALUATION, YOU
23 LOOK ONLY AT THE -- WHAT A NEGOTIATION WOULD HAVE LOOKED LIKE
24 AT THE TIME THE INFRINGEMENT BEGAN.

25 **MS. HURST:** RIGHT.

1 **THE COURT:** I THINK WHAT YOU'RE SAYING, MS. HURST, IS
2 YOUR CLIENT'S EXPERTS ARE LOOKING AT A NUMBER OF THINGS, AND
3 YOU MAY PROPOSE DIFFERENT MODELS TO GET AT DIFFERENT PARTS OF
4 THE VALUATION. SOME MIGHT BE CENTERED ON A HYPOTHETICAL
5 NEGOTIATION MODEL AND SOME MIGHT BE CENTERED ON SOMETHING
6 ELSE. IS THAT WHAT YOU'RE SAYING?

7 **MS. HURST:** YES, YOUR HONOR. AND THE SOMETHING ELSE
8 IS REALLY THE VALUE OF THE USE, TO BE REALLY SHARP FOR THE
9 COURT. IT'S THE VALUE OF THE USE, WHICH IS -- YOU KNOW, I
10 DON'T WANT TO GET INTO AN EXTENDED PATENT ANALOGY BECAUSE I AM
11 THE ONE SAYING IT DOESN'T APPLY. BUT IF WE HAD TO PICK
12 SOMETHING, IT WOULD BE MORE LIKE "THE BOOK OF WISDOM", LIKE
13 WHAT REALLY HAPPENED. RIGHT?

14 AND THE VALUE OF THE USE IS SUPPORTED AS AN ELEMENT BY THE
15 CASES THAT I'VE DESCRIBED AND ALSO BY THE FORM JURY
16 INSTRUCTION ON ACTUAL DAMAGES IN THE NINTH CIRCUIT JURY
17 INSTRUCTIONS, YOUR HONOR. THE ONE ON, YOU KNOW, USING LICENSE
18 VALUE TO CALCULATE ACTUAL DAMAGES.

19 LET ME JUST PAUSE THERE FOR A MOMENT AND SAY THIS IS --
20 IT'S A THEORY OF ACTUAL DAMAGES. IT'S NOT A THEORY OF A
21 STATUTORY MINIMUM THE WAY REASONABLE ROYALTY IS. RIGHT? SO
22 THERE'S JUST A DIFFERENT CONGRESSIONAL FRAMEWORK THERE THAT WE
23 ARE DEALING WITH. RIGHT? AND COPYRIGHT, THE STATUTORY
24 MINIMUM IS STATUTORY DAMAGES. IT'S THAT RANGE THAT WE ALL
25 KNOW ABOUT. THAT'S THE COMPARABLE ANALYSIS TO REASONABLE

1 ROYALTY.

2 WHAT WE HAVE HERE IS A THEORY OF ACTUAL DAMAGES, WHICH IS,
3 IN EFFECT, A CONSTRUCTIVE LICENSE. AND THAT IS VALUED NOT
4 JUST ON THIS *GEORGIA-PACIFIC* APPROACH, BUT ALSO THE VALUE OF
5 THE USE. AND THAT PHRASE "THE VALUE OF THE USE" IS USED IN
6 THE FORM INSTRUCTION AS WELL, YOUR HONOR. THE NUMBER OF WHICH
7 I AM NOT REMEMBERING RIGHT NOW. IT'S EITHER 17 -- 1728, MAYBE
8 1733.

9 **THE COURT:** OKAY. THANK YOU. THAT'S ALL I HAVE GOT
10 RIGHT AT THE MOMENT. LET ME TURN TO GOOGLE.

11 **MS. HURST:** MAY I?

12 **THE COURT:** YES.

13 **MS. HURST:** THANK YOU, YOUR HONOR.

14 **THE COURT:** ALTHOUGH, IF THINGS GET GOING, I'M GOING
15 TO ASK --

16 **MS. HURST:** YOU KNOW WHAT? THEN I WILL JUST STAY UP
17 HERE THEN, YOUR HONOR. I WILL STAY RIGHT UP HERE, YOUR HONOR.
18 THANK YOU.

19 **THE COURT:** IT'S A LOT EASIER FOR OUR COURT REPORTER
20 AND, FRANKLY, I CAN HEAR YOU BETTER AS WELL.

21 OKAY. MR. VAN NEST.

22 **MR. VAN NEST:** THANK YOU, YOUR HONOR.

23 **THE COURT:** THE ARGUMENTS IN GOOGLE'S PART OF THE
24 LETTER SEEM TO LOOK AT PROBLEMS WITH CAUSAL LINK, WHICH I
25 THINK IS NOT BEFORE ME AT THE MOMENT. THAT'S GOING TO COME UP

1 IN A *DAUBERT* MOTION. WE ARE REALLY LOOKING AT DISCOVERY AIMED
2 AT DEVELOPING THIS CONTROL MODEL AND THE VALUE OF CONTROL TO
3 ANDROID. WHY --

4 **MR. VAN NEST:** HERE'S --

5 **THE COURT:** ARE YOU ARGUING THAT ORACLE HAS TO PROVE
6 THAT IT'S GOING TO HAVE A SUFFICIENT CAUSAL LINK AND KIND OF
7 ALLOCATION AND CAUSATION THEORIES BEFORE THEY GET TO
8 DISCOVERY?

9 **MR. VAN NEST:** NO. NO, YOUR HONOR. NOT AT ALL. I
10 APPRECIATE THE CHANCE TO APPEAR BEFORE YOU TODAY.

11 THE ARGUMENTS I HEARD FROM COUNSEL, OF COURSE, ARE VERY
12 DIFFERENT THAN WHAT WAS IN THEIR PAPERS AND VERY DIFFERENT
13 FROM WHAT'S IN THEIR EXPERT REPORT. SO I WANT TO FRAME UP
14 WHAT WE THINK IS WRONG HERE.

15 THEIR BASIC ARGUMENT IN THE LETTER THEY SENT YOU WAS THAT
16 WE NEED THIS FOR THE HYPOTHETICAL NEGOTIATION. AND, OF
17 COURSE, YOU ALREADY STRESSED OUT THAT THIS AGREEMENT IS LATER
18 IN TIME. THE HYPOTHETICAL NEGOTIATION WAS IN '06, '07.

19 THEY HAVE ABANDONED THAT IN THEIR EXPERT REPORT. THEY ARE
20 NO LONGER SEEKING TO PROVE DAMAGES BASED ON A HYPOTHETICAL
21 LICENSE. SO THAT'S OUT.

22 **THE COURT:** CAN I JUST STOP YOU FOR A MOMENT?

23 **MR. VAN NEST:** YEAH.

24 **THE COURT:** DOES THAT MEAN THAT SINCE YOU FILED THE
25 JOINT LETTER, THERE'S ALREADY BEEN AN EXPERT REPORT?

1 **MR. VAN NEST:** YES, THERE WAS. IT WAS FILED ON
2 JANUARY 8TH. JUST LAST WEEK.

3 SO IN THEIR EXPERT REPORT, YOUR HONOR, THERE ARE TWO
4 THEORIES OF DAMAGES. ONE IS LOST PROFITS. LOST PROFITS THEY
5 SAY, WELL, WE WERE GOING TO LICENSE JAVA, AND WE HAD ALL THESE
6 GREAT PROJECTIONS, AND THEN ANDROID CAME ALONG, AND BOOM, WE
7 DIDN'T HIT OUR PROJECTIONS SO THAT MUST BE ANDROID'S FAULT.

8 THEY ARE NOT SEEKING TO TIE THIS DISCOVERY TO THAT. IT'S
9 NOT RELEVANT TO THAT. IT HAS NOTHING TO DO WITH THAT. SO AS
10 TO THAT THEORY THAT'S -- THERE'S NO QUESTION THESE ARE OUTSIDE
11 OF THAT. AND SO THEY ARE LOOKING AT THE SECOND THEORY.

12 THE SECOND THEORY IS DISGORGEMENT. NOW, ON DISGORGEMENT,
13 THEY SAY, WELL, WE ARE ENTITLED TO THE ENTIRETY OF THE ANDROID
14 REVENUES MINUS THE COST, AND THEY DON'T DO AN APPORTIONMENT,
15 THEY ARE WAITING FOR US TO DO THAT.

16 THEY HAVE NEVER BEFORE ARGUED THAT THIS INFORMATION THEY
17 WANT NOW IS RELEVANT TO APPORTIONMENT. THAT'S BRAND NEW
18 TODAY. NOT IN THE PAPERS, NOT ANYWHERE ELSE.

19 WHY IS THAT NUTS? BECAUSE WHAT THEY ARE ASKING FOR IS NOT
20 THE REVENUES THAT WE EARNED FROM THE APPLE RELATIONSHIP, THEY
21 HAVE THAT. IT'S NOT THE NATURE OF THAT AGREEMENT. THEY KNOW
22 THAT. THEY ARE ASKING FOR THE SPECIFIC TERMS OF THE
23 APPLE/GOOGLE AGREEMENT. BUT, OF COURSE, THE APPLE/GOOGLE
24 AGREEMENT HAS NOTHING TO DO WITH ANDROID. IT HAS NOTHING TO
25 DO WITH THE JAVA API'S. THE APPLE PLATFORM IS NOT A JAVA

1 PLATFORM. THE 37 JAVA API'S HAVE NOTHING TO DO WITH OUR APPLE
2 AGREEMENT. THAT APPLE/GOOGLE AGREEMENT HAS NOTHING TO DO WITH
3 ANDROID.

4 **THE COURT:** I UNDERSTAND THAT.

5 **MR. VAN NEST:** THAT'S THE --

6 **THE COURT:** WHAT MS. HURST EXPLAINED IS THAT THIS
7 INFORMATION IS GOING TO PROVIDE A COMPARISON POINT.

8 SO SHE'S -- HER CLIENT IS GOING TO DERIVE VALUE BY LOOKING
9 AT WHAT GOOGLE HAD TO PAY WHEN IT WASN'T IN CONTROL.

10 **MR. VAN NEST:** WHAT SHE'S ASKING IN HER MOTION IS THE
11 SPECIFIC TERMS OF THE APPLE/GOOGLE AGREEMENT AND OTHER
12 NON-ANDROID DISTRIBUTION AGREEMENTS. THAT'S WHAT WE ARE
13 OBJECTING TO.

14 SHE KNOWS WHAT WE PAID BECAUSE I'VE GOT A HANDFUL OF
15 DOCUMENTS THAT SHOW THAT. SHE KNOWS WHAT THE DEAL IS. OUR
16 30(B)(6) WITNESS OUTLINED THE REVENUE SHARING PERCENTAGE. SHE
17 HAS A DOCUMENT WHICH WE PRODUCED WHICH HAS THE MONTHLY
18 REVENUES OFF THIS DEAL EVERY MONTH FROM JANUARY 2008 FORWARD.

19 AND WE ARE NOT OBJECTING TO GIVING THEM FINANCIAL
20 INFORMATION. WE HAVE DONE THAT.

21 WHAT SHE'S ASKING AND WHAT WE ARE OBJECTING TO IS SHE
22 WANTS THE AGREEMENT ITSELF, ALL THESE AGREEMENTS WHICH ARE
23 HIGHLY SENSITIVE, AND SHE WANTS ALL THE AGREEMENTS AND SHE
24 WANTS A DISCUSSION OF ALL OF THE TERMS IN ALL OF THE
25 AGREEMENTS.

1 WHAT SHE ALREADY HAS -- IF WHAT SHE WANTS TO SAY IS THIS
2 GENERAL ATMOSPHERIC POINT THAT THE PLATFORM IS VALUABLE AND
3 THAT SHOULD BE FACTORED INTO APPORTIONMENT, SHE HAS EVERYTHING
4 SHE NEEDS TO DO THAT. SHE KNOWS WHAT PERCENTAGE OF THE
5 REVENUE IS SHARED. SHE KNOWS WHAT THE TOTAL REVENUES WERE.
6 SHE KNOWS THAT FROM 2008, AND PROBABLY EARLIER FORWARD. SHE
7 HAS DOCUMENT AFTER DOCUMENT WHERE WE DISCUSS OUR RELATIONSHIP
8 WITH APPLE, AND THE REVENUES THAT FLOW FROM THAT, THE SHARING
9 THAT FLOWS FROM THAT, THE STRATEGY OF THAT, THE MONTHLY
10 REVENUES FROM THAT. AND WE'RE NOT OBJECTING TO PROVIDING IT.
11 WE HAVE ALREADY DONE THAT.

12 WHAT SHE'S NOW ASKING IS NOT LOGICALLY RELATED TO WHAT SHE
13 SAYS SHE WANTS TO PROVE. SHE WANTS TO PROVE THAT THE PLATFORM
14 WAS VALUABLE. NOW, WE MAY DISPUTE THAT. BECAUSE, OF COURSE,
15 THIS PLATFORM AT APPLE IS A VERY DIFFERENT FROM AN ANDROID
16 PLATFORM, BUT OKAY.

17 IF SHE'S TRYING TO PROVE SOME GENERIC CONCEPT OF PLATFORM
18 VALUE, OKAY FINE. SHE HAS MORE THAN ENOUGH INFORMATION RIGHT
19 NOW TO DO THAT AND SHE HAS TWO MORE DEPOSITIONS COMING UP AT
20 THE END OF THIS MONTH FROM ADDITIONAL FINANCIAL AND
21 RELATIONSHIP FOLKS WHERE SHE CAN PRESUMABLY ASK MORE ABOUT IT.

22 WHAT WE ARE OBJECTING TO IS SPECIFIC. WE OBJECT TO
23 TURNING THE AGREEMENTS OVER. WE DON'T WANT TO GET INTO FIGHTS
24 WITH APPLE OR ANYBODY ELSE. THEY'LL BE IN HERE SEEKING A
25 PROTECTIVE ORDER. THEY'LL BE IN HERE -- BECAUSE THEY HAVE

1 RIGHTS UNDER THESE AGREEMENTS TOO. IT'S CONFIDENTIAL FROM
2 THEIR STANDPOINT AND GOOGLE'S. IT'S THE TERMS OF THESE
3 AGREEMENTS. AND THEY HAVE NOTHING TO DO WITH ANY ARGUMENT
4 SHE'S ARTICULATED.

5 **THE COURT:** OKAY. MS. HURST, A COUPLE OF THINGS.

6 FIRST OF ALL, I DIDN'T REALIZE THERE WAS AN INTERVENING
7 EXPERT REPORT. I KNOW IT'S NOT FILED. I'M NOT ASKING THAT
8 YOU PROVIDE IT, AT LEAST AT THIS POINT.

9 BUT I WILL SAY THAT IN THE JOINT LETTER, ORACLE WAS REALLY
10 FOCUSING ON THE NOTION OF THE HYPOTHETICAL LICENSE. IS IT
11 TRUE THAT THAT'S NOT REALLY PART OF THE EXPERT REPORT THAT WAS
12 FILED LAST WEEK?

13 **MS. HURST:** YOUR HONOR, IT'S TRUE BECAUSE WE DON'T
14 HAVE THE DATA TO DO IT. AND THIS MOTION IS PART OF THAT. AND
15 THE OTHER PENDING MOTION AND THE ADDITIONAL DISCOVERY IS ALL
16 PART OF THAT.

17 FURTHERMORE, YOUR HONOR, THEY HAVE NOT IN ANY WAY
18 REPRESENTED THAT THEY ARE GOING TO EXCLUDE HYPOTHETICAL
19 LICENSE AS PART OF THEIR REBUTTAL DAMAGES REPORT.

20 **THE COURT:** OKAY.

21 **MS. HURST:** SO WE HAVE TWO DIFFERENT PROBLEMS HERE.
22 IF I MIGHT ADDRESS SOME OF THE ASSERTIONS ABOUT WHATEVER --

23 **THE COURT:** HOLD ON.

24 **MR. VAN NEST:** MAY I RESPOND BRIEFLY TO THAT?

25 **THE COURT:** NO. HOLD ON.

1 WE HAVE A COURT REPORTER. I HAVE TO MAKE SURE THAT I'M
2 BEING A GOOD TRAFFIC COP HERE BECAUSE HER JOB IS HARD ENOUGH
3 AS IT IS.

4 WHAT I WANT TO HEAR, MS. HURST, IS WHY YOUR CLIENT NEEDS
5 THE GRANULAR DATA.

6 **MS. HURST:** YOUR HONOR, WE MADE AN OFFER THAT WOULD
7 HAVE OBIATED THE NEED FOR GRANULAR DATA. WHAT WE SAID WE
8 NEEDED WAS THE COMMERCIAL TERMS OF THE AGREEMENT.

9 AND THAT WE DO NOT, ABSOLUTELY DO NOT HAVE IN ANY
10 ADMISSIBLE FORM. BECAUSE WE HAVE ASKED WITNESS AFTER WITNESS
11 ABOUT IT, AND THEY HAVE BEEN UNABLE TO SAY. THAT WAS THE
12 TOPIC 5 OF THE 30(B)(6) DEPOSITION. WE ASKED OTHERS TOO IN
13 CASE WE HIT UPON SOMEBODY WHO KNEW.

14 WHAT I MEAN BY THE COMMERCIAL TERMS IS, WHAT DOES IT
15 COVER? LIKE IF IT WAS A LICENSE, YOUR HONOR, WHAT WAS THE
16 LICENSE TECHNOLOGY. RIGHT? WHAT DOES IT COVER AND WHAT ARE
17 THE ECONOMIC TERMS THAT ARE AGREED WITH ASSOCIATED WITH THAT.

18 WE DON'T HAVE ANY -- WE DON'T HAVE IN ANY ADMISSIBLE FORM
19 THAT I'M AWARE OF, AND THIS IS THE FIRST I'VE HEARD OF THE
20 ASSERTION OF DOCUMENTS PRODUCED SHOWING WHAT THE EXACT SHARING
21 PERCENTAGE OF REVENUES. I'VE CHECKED WITH MY TEAM; THEY DON'T
22 KNOW WHAT THEY ARE TALKING ABOUT NOW.

23 THE KEKER TEAM HAS BEEN PRODUCING DOCUMENTS UP UNTIL LAST
24 NIGHT. SO IF SOMETHING NEW HAS CAME IN, I AM UNAWARE OF IT.

25 BUT PUTTING THAT ASIDE, YOUR HONOR, WE ABSOLUTELY DON'T

1 HAVE THAT IN AN ADMISSIBLE FORM.

2 **THE COURT:** ALL RIGHT.

3 **MS. HURST:** SO WHEN I WAS GIVING YOU THE ANALOGY
4 ABOUT, YOU KNOW, IF IT'S \$2 ON AN \$8 DEVICE, WE DON'T HAVE
5 THAT.

6 **THE COURT:** OKAY. THAT'S WHAT I WANTED TO HEAR.

7 **MR. VAN NEST:** THAT'S NOT TRUE. THAT'S ABSOLUTELY
8 NOT TRUE.

9 OUR 30(B)(6) ON FINANCIAL INFORMATION TOLD THEM WHAT THE
10 REVENUE SHARE PERCENTAGE WAS POINT BLANK. I HAVE THE
11 TESTIMONY.

12 **THE COURT:** REVENUE SHARE AS A PERCENTAGE OF?

13 **MR. VAN NEST:** OF THE -- THE APPLE SHARE AS A
14 PERCENTAGE OF THE TOTAL REVENUE. THAT WAS STATED IN A
15 30(B)(6) DEPOSITION BY OUR, ONE OF OUR FINANCIAL WITNESSES.
16 SO THEY HAVE THAT.

17 WHAT I WOULD LIKE TO SAY TOO, YOUR HONOR, MAYBE YOU SHOULD
18 TAKE A LOOK AT MALAKOWSKI (PHONETIC). HE NEVER EVEN PRETENDS
19 TO DO A HYPOTHETICAL LICENSE. HE NEVER SAYS THAT HE NEEDS
20 THIS FOR THAT PURPOSE. HE SAYS HE NEEDS IT -- HE ACTUALLY
21 DISCUSSES THE APPLE IN THESE OTHER NON-ANDROID AGREEMENTS, AND
22 HE SAYS HE NEEDS THEM FOR A PURPOSE TOTALLY DIFFERENT FROM
23 ANYTHING THAT MS. HURST SAID THIS MORNING. HE DOESN'T SAY
24 ANYTHING ABOUT APPORTIONMENT. HE DOESN'T SAY ANYTHING ABOUT
25 COMMERCIAL USE. WHAT HE TALKS ABOUT IS ESTABLISHING A NEXUS

1 BETWEEN MOBILE PLATFORM CONTROL AND ADVERTISING REVENUES.

2 OKAY? THAT'S WHAT HE'S TALKING ABOUT.

3 THE REASON HE'S NEVER GOING TO DO A HYPOTHETICAL LICENSE
4 ANALYSIS IS THAT JUDGE ALSUP TOLD 'EM LAST TIME, IF THEY WANT
5 TO DO THAT THEY HAVE TO START AT A HUNDRED MILLION. AND THEY
6 ARE NOT SATISFIED WITH THAT STARTING POINT. HE SAID EVEN
7 THOUGH THE LAST GOOGLE OFFER WAS 28 MILLION, HE WANTS THEM TO
8 START OR SUGGEST THEY START AT A HUNDRED. AND THEY WANT
9 BILLIONS, NOT HUNDREDS OF MILLIONS.

10 THERE IS NOTHING IN THIS REPORT ABOUT ANY HYPOTHETICAL
11 LICENSE AND THERE'S NOTHING IN WHICH MALAKOWSKI SAYS THAT HE
12 NEEDS THIS FOR HYPOTHETICAL LICENSE. HE'S SIMPLY NOT DOING
13 IT.

14 **THE COURT:** OKAY. LET'S NOT FOCUS ON THAT RIGHT AT
15 THIS MOMENT.

16 LET'S LOOK AT WHAT MS. HURST SAID SHE NEEDS IT FOR, WHICH
17 IS TO MAKE A COMPARISON BETWEEN THE REVENUES THAT GOOGLE COULD
18 MAKE THROUGH ANDROID PLATFORM VERSUS THE REVENUE IT HAD TO
19 SHARE WHEN IT WAS USING NON-ANDROID PLATFORM.

20 MAYBE I'M NOT SAYING THAT RIGHT. LET ME ASK YOU TO SAY
21 IT. WHAT IS THE EQUATION WE WANT TO PLUG INTO.

22 **MS. HURST:** THE VALUE THAT THE PLATFORM PLAYS IN
23 GENERATING THE ADVERTISING AND OTHER ASSOCIATED REVENUE.

24 **THE COURT:** WHAT ARE THE DATA INPUTS YOU NEED TO GET
25 TO THAT?

1 **MS. HURST:** WELL, THE ONES THAT WE ARE ASKING FOR FOR
2 PURPOSES OF TODAY, AND THERE ARE OTHERS AS WELL THAT WE HAVE
3 BEEN ASKING FOR, AND WE HAVE ACQUIRED SOME, AND THERE ARE MORE
4 DEPOSITIONS COMING, AS MR. VAN NEST POINTED OUT, IS THE
5 REVENUE SHARING AND EXACTLY WHAT IT COVERS.

6 AND LET ME GIVE AN EXAMPLE OF SOME DIFFERENCES THAT WE
7 HAVE SEEN ON WHAT THE KIND OF REVENUE SHARING AGREEMENTS THAT
8 THEY HAVE MIGHT COVER. IT MIGHT COVER, FOR EXAMPLE, AN APP
9 DEVELOPER GETS 70 PERCENT OF THE REVENUE ON ITS APP IN A STORE
10 AND GOOGLE TAKES 30 PERCENT.

11 IT MIGHT COVER A WIRELESS CARRIER, YOU KNOW, JUST THE
12 NETWORK, AND THEY AGREED TO SHARE A CERTAIN PERCENTAGE OF
13 REVENUES WITH WIRELESS CARRIERS.

14 THERE'S ALL SORTS OF DIFFERENT WAYS THEY HAVE AGREED TO
15 SHARE REVENUES AND WHAT THAT COVERS. IT MIGHT COVER AN
16 APPLICATION. IT MIGHT COVER THE CARRIER AGREEING TO RUN THEIR
17 PHONES ON ITS NETWORK. IT MIGHT COVER WHAT'S CALLED A SEARCH
18 ENTRY POINT. SO IF THE COURT'S FAMILIAR AT ALL WITH AN IOS
19 DEVICE, YOU CAN SWIPE DOWN ON THE HOME SCREEN WITH YOUR THUMB
20 AND GET A SEARCH BOX THERE. IT MIGHT COVER SEARCH BOXES. IT
21 MIGHT COVER APPS. IT MIGHT BE THE GOOGLE SEARCH APP OR THE
22 GOOGLE MAPS APP.

23 THESE ARE ALL THE DIFFERENT THINGS THAT THESE AGREEMENTS
24 COVER. AND WE JUST NEED TO KNOW WHAT IT'S COVERING WHEN THEY
25 ARE AGREEING TO SHARE REVENUE BECAUSE THAT INFORMS THE

1 ANALYSIS OF HOW RELEVANT IT IS TO THE PLATFORM VERSUS OTHER
2 THINGS. AND SO --

3 **THE COURT:** CAN YOU NARROW YOUR REQUEST SO THAT IT'S
4 EXCLUDING CERTAIN KINDS OF AGREEMENTS?

5 **MS. HURST:** WELL, WE'VE EXCLUDED NON-MOBILE AND WE'VE
6 EXCLUDED, YOU KNOW, THE ORIGINAL SCOPE OF RFP FOR DISCUSSIONS
7 AND, YOU KNOW, THINGS THAT AREN'T AN ACTUAL AGREEMENT. I'M
8 NOT SURE I CAN GO MUCH FURTHER THAN THAT, YOUR HONOR.

9 I MEAN, IT'S FOR THE DISTRIBUTION OF SEARCH, OBVIOUSLY.
10 IT'S NOT JUST ANY OLD AGREEMENT.

11 **THE COURT:** DO YOU NEED TO KNOW WHO GOOGLE'S
12 CONTRACTING WITH?

13 **MS. HURST:** I MEAN IF IT'S A PLATFORM PROVIDER, IT'S
14 OBVIOUSLY MUCH MORE RELEVANT.

15 **THE COURT:** WHAT IF --

16 **MS. HURST:** AND I THINK THAT'S THE WAY WE ASKED IT,
17 IT WAS NON-ANDROID OPERATING SYSTEMS. SO THAT'S PROBABLY
18 PRETTY LIMITED TO BEGIN WITH.

19 I DON'T IMAGINE THERE ARE SO MANY AGREEMENTS FOR
20 DISTRIBUTION ON NON-MOBILE. NOW WE HAVE LIMITED IT TO MOBILE
21 NON-ANDROID OPERATING SYSTEMS PLATFORMS ECOSYSTEMS. THERE
22 PROBABLY AREN'T THAT MANY OPTIONS FOR THAT.

23 **THE COURT:** YOU'RE LIMITING IT NOW TO MOBILE
24 NON-ANDROID PLATFORM PROVIDERS.

25 **MS. HURST:** YEAH. THAT'S ESSENTIALLY WHAT THE

1 REQUEST WAS EXCEPT FOR THE MOBILE PIECE.

2 **THE COURT:** WITHIN THAT WORLD, DO YOU NEED TO KNOW
3 WHO THE THIRD PARTY IS?

4 **MS. HURST:** YOU KNOW, YOUR HONOR, AS LONG AS GOOGLE'S
5 NOT GOING TO ARGUE THAT IT'S NOT COMPARABLE FOR SOME REASON
6 RELATED TO THE IDENTITY OF THAT PARTY, THEN WE COULD PROBABLY
7 GET AWAY WITH SAYING, OKAY, HERE WAS THE TERM. IT COVERED
8 THIS. THEY GOT -- THIS WAS THE REVENUE SPLIT. AND HERE'S HOW
9 MUCH REVENUE THERE WAS AND HERE'S HOW MUCH WAS PAID. IN OTHER
10 WORDS, A CHART, IF THE COURT'S DIRECTING -- MOVING ME IN THAT
11 DIRECTION.

12 **THE COURT:** MR. VAN NEST?

13 **MR. VAN NEST:** WHAT I'M HAVING TROUBLE WITH -- I
14 APPRECIATE YOUR HONOR'S EFFORT TO NARROW THIS. IT'S FAR
15 NARROWER THAN WE HAVE BEEN TOLD EARLIER.

16 **THE COURT:** BEFORE YOU LAUNCH, LET ME JUST SAY, WHAT
17 I'M HEARING IS THAT THE INFORMATION PROVIDED BY GOOGLE TO DATE
18 DOESN'T REALLY GET AT WHAT THEY NEED FOR THE DAMAGE ANALYSIS
19 BECAUSE IT'S -- THE INFORMATION PROVIDED IS IN A TOO GENERAL A
20 FORM, AND MAYBE SUBJECT TO HAIR SPLITTING AT TRIAL.

21 SO SOUNDS LIKE THEY MAY NEED SOME MORE DETAILED
22 INFORMATION, BUT MAYBE WE CAN GET THERE WITHOUT COMPROMISING
23 GOOGLE OR ITS THIRD-PARTY CONTRACTUAL PARTNER'S PRIVACY.

24 **MR. VAN NEST:** MAYBE WE CAN. AND IF WHAT WE ARE NOW
25 TALKING ABOUT IS FINANCIAL INFORMATION RATHER THAN SPECIFIC

1 DEAL TERMS, I WOULD BE WILLING TO DISCUSS THAT WITH THE
2 CLIENT. THAT'S WHAT I SEEM TO BE HEARING.

3 **THE COURT:** WHAT SHE WANTS IS FOR EACH CONTRACT, WHAT
4 TECHNOLOGY IS COVERED AND WHAT ARE THE ECONOMIC TERMS COVERED
5 BY IT. SO --

6 **MR. VAN NEST:** THAT'S DIFFERENT. RIGHT? THAT'S VERY
7 DIFFERENT.

8 WHAT I'M SAYING IS, FIRST OF ALL, THIS APPORTIONMENT
9 ARGUMENT IS BRAND NEW. NEVER BEEN MADE BEFORE IN ALL OF OUR
10 DISCUSSIONS.

11 **THE COURT:** OKAY. BUT --

12 **MR. VAN NEST:** LET ME REACT TO IT.

13 IF IT'S ABOUT APPORTIONMENT, THEN I'M NOT SURE -- WHAT'S
14 AT ISSUE IN THE CASE IS THE VALUE OF THE 37 API'S, AND THE
15 CAUSAL LINK BETWEEN THEM AND ANY GOOGLE REVENUES.

16 GOOGLE SEARCH IS NOT ACCUSED OF INFRINGEMENT. GOOGLE ADS
17 ARE NOT ACCUSED OF INFRINGEMENT. THOSE ARE DIFFERENT PRODUCTS
18 THAT ARE MADE AVAILABLE ON A VARIETY OF PLATFORMS, MOBILE AND
19 NON-MOBILE, AND WHY THAT WOULD BE SOMETHING COMPARABLE. TO
20 ME, THEY HAVE ALL THE INFORMATION ABOUT WHAT HAPPENS WITH
21 ANDROID AND THE VARIOUS WAYS -- THE VARIOUS AGREEMENTS AND
22 REVENUES THAT FLOW FROM ANDROID.

23 WHY THEY WOULD BE ABLE TO USE WHAT WE DO WITH GOOGLE
24 SEARCH, WHICH IS A DIFFERENT PRODUCT NOT ACCUSED OF
25 INFRINGEMENT, OR WHAT WE DO WITH GOOGLE ADS, WHICH IS A

1 DIFFERENT PRODUCT NOT ACCUSED OF INFRINGEMENT, TO ME, EVEN
2 HEARING IT FOR THE FIRST TIME, IT MAKES ABSOLUTELY NO SENSE.

3 **THE COURT:** THAT'S *DAUBERT*. OKAY?

4 MY UNDERSTANDING IS THE ARGUMENT WILL BE THAT WE NEED TO
5 HAVE SOME WAY OF VALUING ANDROID CONTROL. THAT'S WHAT ORACLE
6 IS SAYING.

7 AND ONE WAY OF LOOKING AT THAT IS SEEING WHAT THEY DON'T
8 HAVE CONTROL. THAT'S THE BASIC IDEA. WHETHER IT PLUGS INTO
9 APPORTIONMENT OR SOME OTHER KIND OF DAMAGE THEORY, I GET THAT
10 BASIC IDEA. I ALSO UNDERSTAND YOUR CLIENT'S CONCERNS.

11 MY QUESTION TO YOU, MR. VAN NEST, WAS IS THERE A WAY IN
12 WHICH YOUR CLIENT CAN PROVIDE THOSE TWO PIECES OF
13 INFORMATION -- FOR EACH CONTRACT, WHAT IS THE LICENSE
14 TECHNOLOGY COVERED AND WHAT ARE THE ECONOMIC TERMS, WITHOUT
15 REVEALING WHO THE CONTRACTING PARTY IS ON THE OTHER SIDE AND
16 ONLY FOR MOBILE NON-ANDROID PLATFORM PROVIDERS.

17 **MR. VAN NEST:** I THINK, YOUR HONOR, I'M RELUCTANT TO
18 DO THAT. BUT I THINK THAT WE MIGHT BE ABLE TO DO THE SAME
19 THING IN A DIFFERENT WAY.

20 WHAT SHE'S TRYING TO GET AT IS WHAT'S THE VALUE? HOW MUCH
21 REVENUE IS BEING SHARED. RIGHT? THEY KNOW THAT FOR APPLE.

22 **THE COURT:** WELL THEY --

23 **MR. VAN NEST:** BUT I THINK -- I THINK IF WE ARE
24 LIMITING IT TO OTHER MOBILE PLATFORM PROVIDERS, THAT'S ONLY
25 PROBABLY TWO OR THREE OTHERS, I THINK THAT THE INFORMATION

1 ABOUT THE REVENUES THAT ARE SHARED, THAT FACT ALONE, THAT'S
2 WHAT THEY ARE REALLY TALKING ABOUT.

3 ALL THEY WANT TO SAY IS, YOU GIVE UP LET'S SAY, YOU GIVE
4 UP 50 PERCENT OF YOUR REVENUE OR 20 PERCENT, WHATEVER
5 HYPOTHETICAL PERCENT, YOU GIVE THAT UP TO GET ON THIS
6 PLATFORM. AND, THEREFORE, THAT INFORMS SOMETHING AS TO
7 APPORTIONMENT.

8 IN TERMS OF THAT NUMBER FOR THESE MOBILE NON-ANDROID
9 PLATFORM FOLKS, I CERTAINLY WOULD BE WILLING TO TALK TO GOOGLE
10 ABOUT WHETHER WE CAN PROVIDE THAT, WHICH IS ALL THEY NEED TO
11 MAKE THE ARGUMENT SHE'S DISCUSSING.

12 WHAT WE ARE NOT WANTING TO GET INTO IS TURNING OVER THE
13 AGREEMENTS OR GOING THROUGH ALL THE SPECIFIC TERMS IN OUR
14 VARIOUS PARTNER, PLATFORM PARTNER AGREEMENTS. THAT'S WHAT WE
15 HAVE OBJECTED TO AND THAT'S WHERE WE WANT TO DRAW THE LINE.

16 BUT IF -- WHAT I AM NOW HEARING IS, WHAT THEY REALLY NEED
17 IS A LITTLE MORE OF A BLUNT INSTRUMENT. HOW MUCH ARE YOU
18 SHARING AND -- OF WHAT YOU EARN, AND WE'RE GOING TO TAKE THAT
19 AND GIVE IT TO MALAKOWSKI, AND HE'S GOING TO DO SOMETHING WITH
20 IT.

21 I THINK AT THAT LEVEL, I WOULD BE PREPARED TO TALK TO
22 GOOGLE ABOUT WHETHER WE COULD DO THAT.

23 **THE COURT:** THE DEVIL IS IN THE DETAILS, AND I WILL
24 HEAR FROM YOU IN A MOMENT, MS. HURST.

25 BUT LET'S SAY YOU DID IT IN CHUNKS LIKE THAT. HERE'S THE

1 REVENUE FROM APPLE, HERE'S THE REVENUE FROM YAHOO, WHATEVER
2 THE OTHERS ARE. WOULD GOOGLE THEN FOREGO ANY REBUTTAL
3 AROUND -- THAT LOOKS AT THAT INFORMATION AS BEING TOO GENERAL?
4 SO THAT INFORMATION --

5 MR. VAN NEST: SURE.

6 THE COURT: INCLUDING --

7 MR. VAN NEST: SURE.

8 THE COURT: -- I THINK THAT SHOULDN'T HAVE BEEN
9 INCLUDED BECAUSE THEY WEREN'T COMPARABLE.

10 MR. VAN NEST: SURE. WELL, WE MAY ARGUE NONE OF
11 THESE ARE COMPARABLE, BUT NOT BASED ON SOME LEVEL OF -- THAT
12 YOU DIDN'T KNOW THIS TERM, OR YOU DIDN'T KNOW THAT TERM, YOU
13 DIDN'T KNOW THAT TERM. SURE.

14 THE COURT: MS. HURST, WOULD THAT DO IT?

15 MS. HURST: YOUR HONOR, HONESTLY, I DON'T KNOW
16 EXACTLY WHAT WE ARE TALKING ABOUT RIGHT NOW.

17 IF WHAT WE ARE TALKING ABOUT IS JUST GENERAL EXPENSE AND
18 REVENUE CATEGORIES, THAT'S NOT GOING TO DO IT. WE NEED
19 SOMETHING MORE THAN ALL THIS DATA LUMPED IN TOGETHER. AND I'M
20 LOOKING AT --

21 THE COURT: WHY?

22 MS. HURST: WELL, THE CHART THAT WE WERE TENTATIVELY
23 SPIT BALLING A MOMENT AGO, I THINK IS WHAT WE NEED. BECAUSE
24 IT SHOWS THE VALUE THAT INDIVIDUAL PLATFORMS CAN CONTRIBUTE TO
25 THE DISTRIBUTION OF SEARCH SERVICES.

1 ANDROID IS AN INDIVIDUAL PLATFORM. IT'S NOT SOME BIG
2 OVERARCHING CATEGORY. AND IT MAY BE THAT THE PERCENTAGES
3 VARY --

4 **MR. VAN NEST:** I'M NOT TALKING ABOUT LUMPING THEM
5 TOGETHER, YOUR HONOR. MAYBE MS. HURST MISUNDERSTOOD.

6 I'M NOT TALKING ABOUT LUMPING THE PLATFORMS TOGETHER.

7 **THE COURT:** I HEARD YOU SAY THERE'S MAYBE THREE OR
8 FOUR, FOUR OR FIVE, AND YOU WILL GIVE THEM SEPARATE NUMBERS
9 FOR THIS PLATFORM -- FOR APPLE AND FOR OTHERS --

10 **MR. VAN NEST:** THEY WOULD GET -- THEY WOULD GET THE
11 COMPARABLE INFORMATION -- THEY KNOW HOW MUCH MONEY GOOGLE
12 EARNS IN THIS APPLE/GOOGLE DISTRIBUTION DEAL. THEY KNOW THE
13 PERCENTAGE OF REVENUE THAT IS SHARED WITH APPLE.

14 THAT'S WHAT I'M TALKING ABOUT. I'M TALKING ABOUT GIVING
15 THEM THAT INFORMATION FOR ANY OTHER MOBILE NON-ANDROID
16 PLATFORM PROVIDER. MICROSOFT, FOR EXAMPLE.

17 **MS. HURST:** WE DON'T KNOW THE DEAL. I WANT TO MAKE
18 SURE APPLE IS NOT GETTING EXCLUDED FROM THIS BY WHAT MR. VAN
19 NEST IS SAYING.

20 WE DON'T HAVE THE DATA IN ADMISSIBLE FORM ON APPLE. WE
21 HAVE SOME VAGUE -- THEY OBJECTED BEFORE THE LAST DEPOSITION.
22 THEY SAID THEY WEREN'T GOING TO PRODUCE A WITNESS ON THIS.
23 MR. GOLD CAME, AND HE SAID, I KNOW BITS AND PIECES OF IT. I
24 XX
25 XX.

1 **THE COURT:** LET'S SAY THAT --

2 **MR. VAN NEST:** COULD I ASK -- EXCUSE ME, YOUR HONOR.
3 THESE NUMBERS ARE CONFIDENTIAL. SO I WOULD ASK THAT THAT
4 PORTION OF HER REMARKS BE SEALED.

5 THAT PERCENTAGE SHE JUST STATED, THAT SHOULD BE SEALED.
6 WE ARE TALKING HYPOTHETICALS HERE. THAT'S NOT A PUBLICLY
7 KNOWN NUMBER.

8 **THE COURT:** IS THAT TRUE?

9 **MS. HURST:** IT'S IN A DEPOSITION THAT'S CONFIDENTIAL,
10 YOUR HONOR. YES.

11 **MR. VAN NEST:** EITHER SEAL IT --

12 **MS. HURST:** THERE'S BEEN A LOT OF PUBLIC REPORTS THAT
13 GOOGLE PAYS APPLE A BILLION DOLLARS A YEAR. SO, YOU KNOW --

14 **THE COURT:** I WILL ASK OUR COURT REPORTER TO JUST
15 MAKE A NOTE THERE. I'LL TAKE A LOOK AT IT. I WILL CONSIDER
16 YOUR REQUEST.

17 **MR. VAN NEST:** THANK YOU, YOUR HONOR. IT'S THE
18 PERCENTAGE THAT I'M COMPLAINING ABOUT. IT'S THE PERCENTAGE.

19 **THE COURT:** RIGHT. AND THERE MAY BE THINGS THAT ARE
20 CONFIDENTIAL IN THE RECORD, BUT NOT NECESSARILY CONFIDENTIAL
21 AT A TRIAL.

22 **MR. VAN NEST:** SURE. THAT'S RIGHT.

23 **THE COURT:** AT SOME POINT SOME --

24 **MR. VAN NEST:** MAYBE SO.

25 **THE COURT:** -- SOME OF THE STUFF IS GOING TO COME

1 OUT. OKAY?

2 I'M NOT PROMISING I WILL SEAL IT, BUT I PROMISE TO TAKE A
3 LOOK.

4 **MR. VAN NEST:** THANK YOU.

5 **THE COURT:** I DO HAVE ONE MORE MATTER BEHIND YOU, SO
6 I WANT TO MOVE IT ALONG.

7 LET'S SAY MR. VAN NEST IS ABLE TO DELIVER WHAT HE JUST
8 DESCRIBED, SEPARATE INFORMATION FOR EACH MOBILE NON-ANDROID
9 PLATFORM PROVIDER, INCLUDING APPLE, GIVING THE PERCENTAGE --

10 **MR. VAN NEST:** OF REVENUE SHARE.

11 **THE COURT:** -- OF REVENUE SHARE AND WHAT ELSE?

12 **MR. VAN NEST:** AND THE TOTAL REVENUES EARNED.

13 **THE COURT:** OKAY. AND LET'S SAY THAT GOOGLE IS GOING
14 TO AGREE TO AUTHENTICATE IT SO THAT YOU CAN USE IT. DOES THAT
15 TAKE CARE OF IT?

16 **MS. HURST:** I THINK WE NEED TO KNOW JUST WHAT IT
17 COVERS IN ADDITION TO THOSE POINTS, YOUR HONOR. I AM NOT
18 TRYING TO BE DIFFICULT, BUT IS IT A SEARCH BOX? IS IT THE
19 SEARCH WIDGET? WHAT IS IT THAT'S COVERED? AND THEN WE ARE
20 GOOD.

21 **THE COURT:** CAN THAT BE A LIST OF THINGS COVERED --

22 **MS. HURST:** SURE. ABSOLUTELY.

23 **MR. VAN NEST:** THAT'S WHERE THE RABBIT GOES IN THE
24 HAT, YOUR HONOR. THEY DON'T NEED THAT. WHAT THEY'RE SAYING
25 IS, THERE'S A PLATFORM, APPLE OR RIM.

1 **THE COURT:** LET ME ASK HER WHY SHE NEEDS IT.

2 **MS. HURST:** YOUR HONOR, THAT IS, THAT IS THE ARGUMENT
3 THEY ARE GOING TO MAKE LATER ABOUT THOSE THINGS AREN'T
4 CAUSALLY LINKED. WE'RE NOT THERE YET.

5 **THE COURT:** THEY PROMISED THEY ARE NOT GOING TO MAKE
6 THAT ARGUMENT.

7 **MS. HURST:** NO, NO. THEY ARE GOING TO MAKE THAT
8 ARGUMENT. I PROMISE YOU. I PROMISE YOU THEY ARE. THEY'RE
9 ALREADY MAKING IT. MR. VAN NEST MAKING IT RIGHT NOW AS A
10 REASON FOR NOT GIVING THE LIST.

11 **THE COURT:** HOLD ON. I HEARD YOU SAY OTHERWISE,
12 MR. VAN NEST.

13 **MR. VAN NEST:** SHE PUT A DIFFERENT WORD AROUND IT
14 "CAUSALLY LINKED". OF COURSE I'M GOING TO ARGUE THAT NONE OF
15 THIS IS CAUSALLY LINKED TO THE 37 API'S.

16 WHAT I SAID TO YOUR HONOR WAS, WOULD I ARGUE THAT YOU
17 CAN'T LOOK AT THESE BECAUSE THEY DON'T TAKE INTO ACCOUNT
18 DIFFERENCES IN THE TERMS OF THE AGREEMENTS. AND I SAID FINE
19 AS TO THAT. THAT'S WHAT I SAID.

20 IN OTHER WORDS, I CAN'T GET UP AND SAY, WELL, YOU CAN'T
21 USE THAT BECAUSE YOU DIDN'T KNOW THAT THE RIM AGREEMENT HAS
22 THIS PARTICULAR TERM OR THE MICROSOFT HAS THAT PARTICULAR
23 TERM. I'M AGREEING THAT I CAN'T MAKE THAT ARGUMENT IF ALL I'M
24 PROVIDING IS THE TOP LINE REVENUE AND REV SHARE.

25 **THE COURT:** DO YOU ALSO AGREE YOU WON'T BE ARGUING

1 THAT IT'S A BAD COMPARISON OR A BAD CAUSAL LINK BECAUSE THIS
2 TRANCHE OF REVENUE WRITTEN (SIC) LARGE FOR THIS PROVIDER
3 COVERS SEARCH AND TOOLBAR AND ET CETERA, ET CETERA, AND SOME
4 OF THOSE SHOULDN'T BE IN THIS ANALYSIS?

5 BECAUSE IF THAT'S TRUE, THEN I THINK SHE NEEDS TO GET THE
6 INFORMATION --

7 **MR. VAN NEST:** IT --

8 **THE COURT:** -- TO BE READY TO COMBAT THAT.

9 **MR. VAN NEST:** AS LONG AS I'M NOT FORECLOSED FROM
10 ARGUING THAT THESE NON-ANDROID PLATFORMS ARE NOT COMPARABLE
11 BECAUSE THEY HAVE NOTHING TO DO WITH JAVA OR THE API'S, AS
12 LONG AS I CAN MAKE THAT ARGUMENT. I DON'T INTEND TO ARGUE --
13 AS LONG AS I CAN ARGUE THAT SEARCH ITSELF IS NOT COMPARABLE
14 AND THE ADS ARE NOT COMPARABLE, I'M FINE. I DON'T NEED TO
15 MAKE FINE DISTINCTIONS BETWEEN AND AMONG THE PRODUCTS THAT ARE
16 NOT ANDROID. THAT'S FINE.

17 I JUST NEED TO BE ABLE TO SAY THAT SEARCH ITSELF IS A
18 TOTALLY DIFFERENT PRODUCT AND IT'S GOOD FOR REASONS UNRELATED
19 TO THEIR API'S. AND THAT ADS ARE A TOTALLY DIFFERENT PRODUCT
20 AND THEY'RE GOOD FOR REASONS UNRELATED TO THE API'S. I NEED
21 TO MAKE THAT ARGUMENT, OF COURSE.

22 BUT WHAT I'M SAYING IS, I'M NOT GOING TO GET UP AND SAY,
23 WELL, THE NUMBERS THEY ARE GIVING YOU ON RIM SHOULD BE
24 IRRELEVANT BECAUSE IT INCLUDES THIS TOOLBAR AND NOT THAT
25 TOOLBAR.

1 I AGREE THAT IF I CAN GET AGREEMENT FROM THE CLIENT TO
2 PROVIDE THIS INFORMATION, THEN WE WOULD FOREGO THAT ARGUMENT.

3 **THE COURT:** WHAT YOU ARE PRESERVING ARE VERY HIGH
4 LEVEL GENERALIZED ARGUMENTS THAT HAVE TO DO WITH DISCOUNTING
5 ANY --

6 **MR. VAN NEST:** RIGHT --

7 **THE COURT:** -- LINK TO A PARTICULAR NON-ANDROID
8 MOBILE PLATFORM OR THIS IS SOMEHOW LINKED TO SEARCH.

9 **MR. VAN NEST:** RIGHT. SEARCH --

10 **THE COURT:** OR ADS --

11 **MR. VAN NEST:** THESE OTHER PRODUCTS. THAT'S RIGHT.

12 **MS. HURST:** WE WANT TO PROVE THAT LINK. WE WANT TO
13 USE THIS INFORMATION IN PART TO PROVE THAT LINK. AND THE LIST
14 OF WHAT IT COVERS AND WHAT THEY ARE WILLING TO SHARE REVENUE
15 ON STRONGLY REINFORCES THAT CAUSAL LINK WHEN THEY DO IT ON
16 ANOTHER PLATFORM AND WHEN THEY DO IT ON ANDROID.

17 SO I NEED THE LIST, YOUR HONOR NOT JUST TO BE ABLE TO
18 RESPOND TO SOMETHING THEY ARE GOING TO SAY, BUT BECAUSE WE
19 HAVE MULTIPLE PURPOSES FOR WANTING THIS INFORMATION.

20 **THE COURT:** SO I'M NOT COMPLETELY UNDERSTANDING WHY
21 YOU NEED IT.

22 **MS. HURST:** WELL, YOUR HONOR, FOR US TO AFFIRMATIVELY
23 PROVE THE CAUSAL LINK, WE WANT TO SHOW THAT ALL THESE THINGS
24 ARE TIED TOGETHER. AND THE REVENUE THAT COMES IN ON ONE END
25 FLOWS -- THE CAUSATION OF THAT FLOWS THROUGH, OR MAYBE THE

1 PYRAMID IS THE BETTER ANALOGY HERE, FLOWS FROM THE TOP TO THE
2 BOTTOM. AND THEY'RE TRYING TO CUT IT OUT AT EVERY LEVEL ALONG
3 THE WAY.

4 I JUST HEARD MR. VAN NEST REINFORCE THAT'S ABSOLUTELY WHAT
5 HE WANTS TO DO. HE WANTS TO SAY, OKAY, THE CAUSAL CHAIN STOPS
6 HERE ON, YOU KNOW, THE SEARCH WIDGET. IT STOPS HERE ON MAPS.

7 WE WANT TO SAY WE'RE THE FOUNDATION. AND WE ABSOLUTELY
8 WERE THE FOUNDATION. IT'S CLEAR FROM THE EVIDENCE THEY NEVER
9 WOULD HAVE GOTTEN THIS THING TO MARKET AND THEY WOULD HAVE
10 MISSED THEIR WINDOW.

11 BUT TO SHOW THE CAUSAL LINK PART OF THIS, WHAT IT MEANS TO
12 BE EXCLUDED FROM THAT CONTROL, WHAT IT MEANS TO LOSE THAT
13 POSITION AND BE LOCKED OUT OF A PLATFORM, WE NEED TO SHOW THAT
14 WHEN THEY ARE PAYING, THEY ARE PAYING FOR ALL OF THESE THINGS
15 OR LESS THAN ALL OF THEM. THAT IS RELEVANT TO THE ANALYSIS.

16 **MR. VAN NEST:** THAT REALLY DOESN'T MAKE ANY SENSE TO
17 ME, YOUR HONOR --

18 **THE COURT:** HOLD ON.

19 WHAT IF THE INFORMATION WERE TO BE PROVIDED FOR EACH
20 NON-ANDROID MOBILE PLATFORM BUT WITHOUT A NAME ATTACHED TO IT?

21 **MS. HURST:** THAT'S OKAY -- WELL, WAIT A MINUTE.
22 WITHOUT -- I'M SORRY. I CERTAINLY THOUGHT WE HAD ALREADY
23 AGREED TO WITHOUT THE NAME OF THE COUNTER PARTY.

24 **THE COURT:** CORRECT.

25 **MS. HURST:** YES.

1 **THE COURT:** WELL, SO THIS MAY BE THE REVENUES FROM
2 APPLE, BUT YOU ARE NOT GOING TO KNOW IT'S FROM APPLE.

3 **MS. HURST:** YES. I THOUGHT WE AGREED TO THAT, YOUR
4 HONOR. YES.

5 **THE COURT:** SO, IN OTHER WORDS, A CHART, I AM NOT
6 TALKING ABOUT DOCUMENTS, BUT WE ARE NOW DOWN TO A CHART THAT
7 WOULD LIST OUT FOR EACH OF THE CONTRACT PARTNERS WHO ARE
8 MOBILE NON-ANDROID PLATFORM PROVIDERS, WHICH WE THINK ARE JUST
9 A HANDFUL; YOU DON'T HAVE TO LIST THE NAME, BUT YOU WOULD LIST
10 THE TOTAL -- THE REVENUE SHARE AND THE TOTAL REVENUE, AND THE
11 LIST OF SERVICES OR TECH THAT ARE COVERED BY THE AGREEMENT BUT
12 WITHOUT A NAME.

13 **MR. VAN NEST:** IT'S THAT THIRD PART THAT I AM
14 OBJECTING TO THAT I THINK WE WOULD WANT TO STAND ON.

15 BECAUSE, AGAIN, TO MAKE THE ARGUMENT THAT SHE WANTS TO
16 MAKE -- THE MALAKOWSKI REPORT WE HAVE. THE ARGUMENT THEY DO
17 MAKE IS THAT ALL OF THE AD REVENUES ARE ATTRIBUTABLE TO THESE
18 37 JAVA API'S --

19 **THE COURT:** THIS IS DISCOVERY, MR. VAN NEST.

20 **MR. VAN NEST:** UNDERSTAND. BUT WHY THEY NEED TO KNOW
21 THE SPECIFIC TERMS -- IF THEIR ARGUMENT IS WHAT THEY SAY IT
22 IS, THAT ALL THIS AD REVENUE THAT'S COMING FROM GOOGLE SEARCH
23 AND ADS IS ATTRIBUTABLE TO THE 37 API'S AND THAT THE CONTROL
24 OF THE PLATFORM IS VALUABLE, RIGHT, BECAUSE YOU ARE WILLING TO
25 PAY A LOT, WHAT I'M OFFERING TO PROVIDE IS ALL THE INFORMATION

1 THEY WOULD NEED TO MAKE THAT ARGUMENT.

2 THEY DON'T BREAK IT DOWN THAT WAY IN THEIR REPORT.
3 THERE'S NO -- MALAKOWSKI DOESN'T BREAK THINGS DOWN IN THAT
4 SENSE. HE'S BASICALLY SAYING HERE'S ALL THE AD REVENUE, AND
5 HERE'S WHAT THE HARDWARE SELLS FOR, AND HERE'S WHAT THE
6 CONTENT SELLS FOR.

7 I DON'T UNDERSTAND WHY THEY WOULD NEED THE SPECIFIC TERMS
8 OF THESE AGREEMENTS.

9 **THE COURT:** WELL, I'M PICTURING FIVE PIECES OF PAPER
10 IF THERE'S FIVE CONTRACTING PARTIES. ONE PIECE OF PAPER SAYS
11 HERE'S THE REVENUE SHARE, HERE'S THE TOTAL REVENUE, AND HERE
12 ARE THE SERVICES, JUST ONE LIST, COVERED BY ALL OF THOSE
13 CONTRACTS. IT DOESN'T SAY HOW MANY -- HOW MUCH OF THE REVENUE
14 SHARE IS CONNECTED TO A PARTICULAR TYPE OF COVERAGE SERVICE.
15 IT'S --

16 **MR. VAN NEST:** THAT'S WHY I AM SAYING WITHOUT -- IT
17 DOESN'T MAKE SENSE TO PROVIDE THE LIST -- THE WHOLE ARGUMENT
18 THEY ARE MAKING IS THAT YOU GET GOOGLE SEARCH AND GOOGLE ADS
19 ON ANDROID AND ON OTHER PLATFORMS. AND THOSE ARE VALUABLE.
20 AND WE NEED TO PROVE THAT YOU'RE WILLING TO PAY MONEY FOR
21 THE -- SHARE REVENUE THAT THOSE PRODUCTS CREATE ON THESE OTHER
22 PLATFORMS.

23 I'M SAYING OKAY. FINE. BUT WHY THEY -- WE'LL PROVIDE --
24 WHAT WE'RE PROVIDING WILL ALLOW THEM TO MAKE THAT ARGUMENT.
25 THEY CAN SAY, LOOK, THE AVERAGE REVENUE SHARE ACROSS THESE

1 PLATFORMS IS X. AND LOOK AT THIS ONE, IT'S Y. AND LOOK AT
2 THIS ONE, IT'S Z. AND LOOK AT THIS ONE, IT'S X.

3 SO THEY'RE PAYING A LOT, THIS WILL BE THEIR ARGUMENT, THEY
4 ARE PAYING A LOT FOR THE RIGHT TO BE ON THE PLATFORM. THAT
5 MEANS THAT PLATFORM CONTROL IS IMPORTANT.

6 THE SPECIFIC TERMS THAT WE HAVE WITH EACH OF OUR PARTNERS
7 IS COMPLETELY IRRELEVANT TO THAT AS LONG AS THEY ARE GETTING
8 THE ECONOMIC FACTS WHICH ARE HOW MUCH IS EARNED AND -- WHICH
9 THEY PROBABLY KNOW NOW BECAUSE THEY HAVE ALL -- BY THE WAY,
10 THEY HAVE ALL OF OUR NON-ANDROID P&L'S AS WELL. BUT THEY
11 PROBABLY HAVE THAT, BUT THEY DON'T HAVE THE REVENUE SHARE
12 NUMBERS FOR THESE. AND THEY ARE ARGUING -- I'M NOT SURE WHY
13 THE APPLE NUMBER ALONE DOESN'T MAKE THE ARGUMENT.

14 **THE COURT:** OKAY. SO LET ME GET A QUICK ANSWER FROM
15 YOU ONE MORE TIME MS. HURST.

16 **MS. HURST:** YOUR HONOR --

17 **THE COURT:** HOLD ON.

18 YOU'RE ASKING FOR VERY GENERALIZED INFORMATION IN A WAY.
19 SO A REVENUE SHARE AND REVENUE NUMBER AND A LIST OF SERVICES
20 THAT ISN'T OTHERWISE DIFFERENTIATED.

21 WHAT DOES THAT GET YOU IN YOUR CAUSAL LINK ARGUMENT? HOW
22 ARE YOU GOING TO ARGUE THAT?

23 **MS. HURST:** WELL, YOUR HONOR, WHAT I WOULD SAY IS THE
24 FACT THAT THEY SHARE REVENUE BROADLY FOR ALL OF THESE THINGS
25 SHOWS THAT THE PLATFORM IS NOT DIFFERENTIATED AND THAT, IN

1 EFFECT, THE FACT THAT THEY HAVE THESE LITTLE WIDGETS DOESN'T
2 MATTER. I MEAN, YES, THEY HAVE DIFFERENT WAYS OF KIND OF
3 COMMERCIALIZING IT WITH ONE WIDGET VERSUS ANOTHER, BUT AT THE
4 END OF THE DAY WHAT MATTERS IS THE PLATFORM.

5 **MR. VAN NEST:** THAT'S MY ARGUMENT. I'M AGREEING WITH
6 THAT. I THINK WE ARE IN AGREEMENT. I'M NOT SURE --

7 **MS. HURST:** ALL RIGHT. IF -- I MEAN --

8 **MR. VAN NEST:** SHE WANTS A LIST OF SERVICES. THE
9 LITTLE WIDGETS DON'T MATTER. SHE WANTS TO KNOW WHAT WE PAY
10 BROADLY TO BE ON THE PLATFORM FOR ALL OF OUR SERVICES,
11 WHATEVER SERVICES WE PROVIDE. YOU CAN DETERMINE FROM PUBLIC
12 RECORDS, I SUPPOSE, WHAT SOME OF THESE SERVICES ARE, BUT WHAT
13 I'M TALKING ABOUT IS WHAT THE SPECIFIC TERMS ARE FOR EACH ONE
14 OF THESE.

15 **THE COURT:** I'M NOT REALLY SEEING HOW -- THE
16 IMPORTANCE OF THAT LEVEL OF DETAIL, MS. HURST.

17 **MS. HURST:** I'M MORE WORRIED ABOUT THE ARGUMENTS THAT
18 ARE GOING TO BE MADE LATER. AND I'M JUST THINKING FOR A
19 MOMENT, YOUR HONOR. BECAUSE I'VE HEARD -- WE BOTH HAVE HEARD
20 SOME NEW THINGS THIS MORNING.

21 AS LONG AS THIS IS NOT A WAY -- LET ME SAY THIS: AS LONG
22 AS THIS IS NOT A WAY TO EXCLUDE ANYBODY WITH A NON -- WITH A
23 MOBILE NON-ANDROID PLATFORM WHO'S RECEIVING A REVENUE SHARE,
24 I'LL LIVE WITH IT.

25 IN OTHER WORDS, AS LONG AS -- WE DON'T KNOW THE LIST AND

1 THEN THEY USE THE LIST TO EXCLUDE SOMEBODY. AS LONG AS I CAN
2 GET RID OF THAT SCENARIO, I'LL LIVE WITH IT.

3 **THE COURT:** YOU'RE SAYING AS LONG AS THIS DEFINITION
4 OF MOBILE NON-ANDROID PLATFORM PROVIDERS COVERS WHO YOU THINK
5 IT SHOULD COVER?

6 **MS. HURST:** RIGHT. WELL, I DON'T KNOW WHO IT IS, ALL
7 OF THEM, BUT AS LONG AS IT COVERS EVERYTHING THAT THEY MIGHT
8 BE REVENUE SHARING ON THOSE PLATFORMS, AS LONG AS WE GET THE
9 TERMS FOR EVERYTHING THAT THEY ARE SHARING.

10 IN OTHER WORDS, WHAT I DON'T WANT TO HAVE HAPPEN IS,
11 THERE'S NO ENTRY ON THE CHART FOR HYPOTHETICAL PLATFORM
12 PROVIDER C BECAUSE THE ONLY THING THEY HAVE A REVENUE SHARE
13 DEAL ON FOR THAT PLATFORM PROVIDER IS A SEARCH WIDGET. RIGHT?
14 THAT SHOULD BE INCLUDED.

15 **THE COURT:** UNDERSTOOD?

16 **MR. VAN NEST:** I THINK SO. I'M NOT SURE WHAT SHE'S
17 WORRIED ABOUT.

18 THERE'S ONLY -- IF WE ARE TALKING ABOUT PLATFORM PROVIDERS
19 THAT ARE MOBILE, THERE'S MICROSOFT, THERE'S RIM, THAT'S SORT
20 OF ABOUT IT. I'M NOT SURE WHO ELSE WE ARE TALKING ABOUT.

21 **MS. HURST:** OVER TIME THERE'S A NUMBER MORE THAN
22 THAT. AND GOOGLE HAS BEEN AROUND FOR A WHILE AND IT'S BEEN
23 PAYING TO GET DISTRIBUTION FOR A WHILE. SO IN THE PAST, THERE
24 MAY HAVE BEEN MORE. THERE'S NOKIA, THERE'S, YOU KNOW,
25 MOTOROLA BEFORE THEY ACQUIRED IT. I MEAN, THERE'S A NUMBER

1 OF -- I DON'T KNOW WHAT EXISTS. I JUST WANT TO MAKE SURE THAT
2 NOTHING GETS LEFT OUT.

3 **MR. VAN NEST:** I'M NOT ANTICIPATING THAT. WHEN SHE
4 SAYS "EXCLUDED", I THINK SHE MEANS EXCLUDED FROM DISCOVERY.

5 I AM GOING TO ARGUE, AS I SAID, THAT NONE OF THIS STUFF IS
6 RELEVANT AND IT DOESN'T SHOW ANYTHING, APPORTIONMENT OR
7 OTHERWISE. I AM RESERVING ALL MY RIGHTS TO ARGUE THAT IT'S
8 IRRELEVANT EXCEPT FOR SAYING IT'S NOT RELEVANT BECAUSE YOU
9 DIDN'T HAVE THIS TERM OR THAT TERM, THAT PART.

10 **THE COURT:** AND YOU ALSO ARE NOT GOING TO ARGUE THAT
11 THIS IS NOT A GOOD COMPARISON TO APPLE AS OPPOSED TO SOME
12 OTHER NON-ANDROID PROVIDER BECAUSE YOU'VE AGREED TO NOT GIVE
13 THE NAMES, RIGHT? BY --

14 **MR. VAN NEST:** I'M NOT PROVIDING NAMES. THAT'S
15 RIGHT.

16 **THE COURT:** RIGHT. SO BY -- AND THAT MEANS YOU'RE
17 NOT GOING TO BE -- YOU'RE AGREEING TO NOT MAKE ARGUMENTS BASED
18 ON DIFFERENTIATION BETWEEN PROVIDERS WHEN YOU DIDN'T PROVIDE
19 THE NAMES.

20 **MR. VAN NEST:** I THINK THAT'S RIGHT, YOUR HONOR.
21 HOWEVER, HOWEVER, I THINK THERE'S GOING TO BE ARGUMENT IN THE
22 TRIAL AND PROBABLY IN THE EXPERT REPORTS ABOUT APPLE, BECAUSE
23 THEY ALREADY HAVE A LOT OF INFORMATION ABOUT APPLE, INCLUDING
24 THE REV SHARE AND SO ON.

25 SO I WANT TO BE ARGUING THAT APPLE IS WHAT IT IS BECAUSE

1 OF THINGS APPLE DID, NOT BECAUSE OF THINGS THESE 37 API'S DID,
2 AND ALL THAT. BUT AM I GOING TO ARGUE THAT SOME NUMBER THEY
3 PICKED OUT IS IRRELEVANT BECAUSE THEY HAVEN'T IDENTIFIED WHO
4 IT IS? OR BECAUSE -- NO, I CAN'T ARGUE THAT.

5 **THE COURT:** OR BECAUSE APPLE IS DIFFERENT FROM RIM
6 AND SO WE -- THIS IS EVEN FURTHER --

7 **MR. VAN NEST:** OKAY. YEAH. I DON'T THINK SO. I
8 THINK -- THEY ARE DIFFERENT BECAUSE THE THINGS WE SHARE ARE
9 DIFFERENT. IT'S -- RIGHT. THAT'S WHAT YOU ARE GETTING AT. I
10 AGREE WITH THAT.

11 AT THAT LEVEL THEN, IF I CAN -- IF THERE'S A WAY OF
12 PROVIDING THIS INFORMATION AND THIS INFORMATION EXISTS,
13 CERTAINLY THE REV SHARE INFORMATION EXISTS, I WILL ENDEAVOR TO
14 DO THAT.

15 **THE COURT:** OKAY. HERE'S WHAT I'M GOING TO ORDER THE
16 PARTIES TO DO. YOU ARE GOING TO DO A BETTER JOB OF PUTTING
17 TOGETHER A PROPOSED ORDER -- WELL, PROPOSED ORDER. YOU CAN
18 FRAME IT AS A STIPULATION OR AS A PROPOSED ORDER. EITHER WAY
19 I AM ORDERING IT. OKAY?

20 SO GOOGLE IS GOING TO BE PROVIDING INFORMATION FOR EACH
21 MOBILE NON-ANDROID PLATFORM PROVIDER THAT HAS THE REVENUE
22 SHARE FOR THAT PROVIDER, THE TOTAL REVENUE, AND THEN A LIST OF
23 THE SERVICES THAT ARE COVERED BY THE AGREEMENT.

24 GOOGLE DOES NOT HAVE TO NAME WHO THE PROVIDER IS IN ORDER
25 TO PROTECT THE COMPETITIVE INFORMATION OF THEIR CONTRACTING

1 PARTNER, BUT GOOGLE HAS AGREED THAT IT WILL NOT ARGUE ABOUT
2 DIFFERENCES BETWEEN THE PLATFORM PROVIDERS AS A BASIS OF
3 REBUTTING ORACLE'S DAMAGE ANALYSIS, AND THEY ALSO ARE NOT
4 GOING TO BE -- WELL, THAT IS THE CONCESSION.

5 **MR. VAN NEST:** THAT'S NOT FAIR. THAT IS NOT WHAT --
6 IF I'M PROVIDING A LIST OF THE SERVICES, THEN I SHOULD BE
7 ALLOWED TO ARGUE THE DIFFERENCES.

8 MY POINT WAS, IF I DON'T --

9 **THE COURT:** MAYBE I DIDN'T SAY THIS RIGHT.

10 IF YOU ARE NOT GOING TO NAME THIS IS THE APPLE NUMBER AND
11 THIS IS THE RIM NUMBER, THEN YOU CAN'T ARGUE THAT, GEE, RIM IS
12 A WHOLE DIFFERENT SITUATION THAN APPLE BECAUSE YOU DIDN'T SAY
13 WHICH ONE IS WHICH.

14 **MR. VAN NEST:** RIGHT. BUT WHAT I THOUGHT WE WERE
15 TALKING ABOUT, WHAT I WAS OBJECTING TO PROVIDING, YOUR HONOR,
16 IS NOT THE REV SHARE, NOT THE REVENUE, BUT THE LIST OF
17 SERVICES ON EACH PLATFORM.

18 AND I SAID IF I DON'T HAVE TO PROVIDE THAT, THEN
19 OBVIOUSLY -- AND THAT'S -- BUT YOUR PROPOSED ORDER, I HAVE TO
20 PROVIDE THAT I THOUGHT YOU JUST --

21 **THE COURT:** CORRECT. YOU HAVE TO PROVIDE THAT. AND
22 YOU ARE NOT GIVING UP YOUR ABILITY TO ARGUE DIFFERENTIATIONS
23 ON THOSE PARTICULAR SERVICES, BUT --

24 **MR. VAN NEST:** I WOULD RATHER GIVE THAT UP AND NOT
25 HAVE TO PROVIDE THE LIST, IN ALL CANDOR. THAT'S WHAT WE ARE

1 REALLY OBJECTING TO IS THE DETAILS --

2 **THE COURT:** I AM -- I'M SORRY.

3 **MR. VAN NEST:** BECAUSE I THOUGHT WE ESTABLISHED THAT
4 THEY DON'T REALLY NEED THAT TO MAKE THE POINT THEY WANT TO
5 MAKE AS LONG AS THEY HAVE THE, YOU KNOW, THE REV SHARE AND THE
6 REVENUE INFORMATION.

7 **THE COURT:** I GOT AHEAD OF MYSELF. LET ME JUST BACK
8 UP A BIT.

9 (PAUSE IN THE PROCEEDINGS.)

10 **THE COURT:** MS. HURST, YOU AGREED THAT YOUR CLIENT --
11 WELL, LET ME PUT IT BACK ON YOU. WHAT IS YOUR CLIENT WILLING
12 TO LIVE WITH?

13 **MS. HURST:** I THINK I WOULD HAVE TO CONSULT WITH MY
14 CLIENT TO ACTUALLY ANSWER THAT QUESTION AS PHRASED, YOUR
15 HONOR, BUT I REALIZE I'M HERE, AND I'M THE ONE WHO'S GOT TO
16 SPEAK. OKAY?

17 **THE COURT:** RIGHT. THAT WE JUST TALKED ABOUT, JUST
18 SO I AM NOT MISFRAMING THIS.

19 **MS. HURST:** I AM LISTENING TO THIS, AND I HAVE A VERY
20 HIGH DEGREE OF CONCERN THAT WITHOUT THE LIST OF SERVICES, IT'S
21 GOING TO BE HARD TO FRAME WHAT THEY ARE NOT ALLOWED TO ARGUE.
22 AND IT IS GOING TO BE VIRTUALLY UNENFORCEABLE.

23 AND SO I'M STRUGGLING WITH THAT BECAUSE I HEARD THE COURT
24 SAY THAT -- THE PART CONNECTED WITH IDENTITY, AND THAT MADE
25 SENSE, RIGHT?

1 **THE COURT:** RIGHT.

2 **MS. HURST:** I'M TRYING TO FIGURE OUT WHAT THE
3 COMPARABLE PIECE IS IF THE LIST OF SERVICES DID NOT HAVE TO BE
4 PROVIDED.

5 **THE COURT:** RIGHT.

6 **MS. HURST:** RIGHT? AND SO I WOULD IMAGINE THAT THEY
7 MIGHT WANT TO ARGUE, WELL, THAT HIGHER PERCENTAGE IS NOT
8 COMPARABLE BECAUSE WE HAD ALL THESE APPS ON THERE. RIGHT?
9 AND THEY ARE GOING TO WANT TO ARGUE, WELL, YOU KNOW, THAT ONE
10 IS NOT COMPARABLE BECAUSE IT HAD ONLY THE ONE THING ON IT. I
11 DON'T KNOW HOW WE ARE EVER GOING TO ENFORCE THAT.

12 **MR. VAN NEST:** RATHER THAN TRY TO TAKE THIS ON THE
13 FLY, BECAUSE IT'S ALL NEW FROM THE BRIEFING, WHY DON'T YOU --
14 WHY DON'T WE DO SOME MEETING AND CONFERRING.

15 I THINK, I THINK WE CAN COME TO A STIPULATION THAT
16 RESTRICTS MY ABILITY TO ARGUE BASED ON WHAT THEY'RE GIVING UP
17 IN TERMS OF DETAIL. I THINK WE CAN DO THAT.

18 **THE COURT:** THAT'S THE CONCEPT, BUT --

19 **MR. VAN NEST:** THAT'S THE IDEA.

20 **THE COURT:** BUT IF IT DOESN'T WORK, THEN YOU ARE
21 COMING BACK AND I WILL CERTAINLY CONSIDER MAKING YOU LIST OUT,
22 AT A MINIMUM, LIST OUT SERVICES.

23 SO SEE IF YOU CAN COME UP WITH A WAY TO AVOID THAT BUT
24 GIVING ORACLE APPROPRIATE PROTECTION FROM ARGUMENTS COMING
25 FROM GOOGLE.

1 **MR. VAN NEST:** I THINK WE CAN REACH AGREEMENT ON
2 THAT. AT LEAST WE'LL TRY.

3 **MS. HURST:** YOUR HONOR, MAY I INQUIRE AS -- THAT
4 WOULD BE HELPFUL TO THIS NEGOTIATION.

5 IF GOOGLE WILL REPRESENT THAT IT IS NOT GOING TO PRESENT
6 ANY HYPOTHETICAL LICENSE CALCULATION ASSOCIATED WITH ANYTHING.

7 **MR. VAN NEST:** WELL, I'M NOT GOING TO REPRESENT THAT,
8 YOUR HONOR. BUT THAT HAS NOTHING TO DO WITH THIS ARGUMENT.

9 **THE COURT:** I DON'T SEE WHY HE NEEDS TO DO THAT.

10 **MS. HURST:** WELL, YOUR HONOR, BECAUSE THE GRANULARITY
11 OF THE INFORMATION THAT WE ARE TALKING ABOUT HERE IS -- SO FAR
12 WE HAVEN'T -- I GUESS I SHOULD SAY IT ANOTHER WAY.

13 IF WE DON'T, THEY DON'T EITHER. THAT WOULD BE THE
14 REPRESENTATION.

15 **MR. VAN NEST:** IF --

16 **THE COURT:** IF THEY DON'T GET THE GRANULARITY, THEN
17 YOU SHOULDN'T BE ABLE TO ARGUE WITH THAT LEVEL OF GRANULARITY.

18 **MR. VAN NEST:** FOR THESE NON-MOBILE PROVIDERS? I
19 WOULD CERTAINLY CONSIDER DISCUSSING THAT WITH HER. THAT
20 DOESN'T SHOCK ME OR ANYTHING LIKE THAT.

21 BUT SHE ASKED ME WOULD I REFRAIN FROM MAKING A PARTICULAR
22 DAMAGES ARGUMENT, AND THERE'S NO REASON FOR ME TO DO THAT.

23 **THE COURT:** I THINK THE WAY YOU STATED IT MAKES
24 SENSE; THAT IF YOU DON'T GET THAT GRANULARITY FOR THIS --

25 **MR. VAN NEST:** PORTION.

1 **THE COURT:** -- BODY OF INFORMATION, THEN THEY CAN'T
2 ARGUE IT IN ANY WAY.

3 **MR. VAN NEST:** I THINK THAT'S RIGHT. THAT'S THE
4 CONCEPT, AND I THINK WE CAN WORK THAT OUT.

5 WE CERTAINLY WOULDN'T BE USING NON-MOBILE DISTRIBUTION
6 AGREEMENTS TO PROVE A HYPOTHETICAL NEGOTIATION EITHER BECAUSE
7 WE ARE TALKING ABOUT AGREEMENTS THAT ARE LONG AFTER THE
8 NEGOTIATION.

9 **THE COURT:** TO PROVE UP YOUR PART OF THE CASE OR TO
10 ATTACK?

11 **MR. VAN NEST:** EITHER. YEAH.

12 **MS. HURST:** I JUST -- OKAY. THE DEVIL IS IN THE
13 DETAILS HERE, YOUR HONOR. I APPRECIATE THE COURT'S TIME AND
14 FACILITATING THIS DISCUSSION, AND WE WILL MAKE EVERY EFFORT TO
15 TURN THIS TENTATIVE CHART INTO AN AGREEMENT OR A PROPOSED
16 ORDER, OR COMPETING PROPOSED ORDERS, WHATEVER IT IS.

17 **THE COURT:** WELL, IT'S GOING TO BE -- YES, I GUESS
18 THAT'S RIGHT. IF IT'S COMPETING PROPOSED ORDERS, YOU ARE
19 PROBABLY GOING TO COME BACK IN.

20 WHAT'S HAPPENED IS THINGS HAVE SHIFTED SINCE YOU FILED THE
21 LETTER. WE ARE ALL GETTING NEW INFORMATION. I'M GOING TO --
22 IF YOU ARE NOT ABLE TO REACH AGREEMENT, MS. HURST, YOU'RE
23 GOING TO PUSH FOR FURTHER DETAIL, I'M GOING TO HAVE TO HAVE A
24 MUCH BETTER UNDERSTANDING OF HOW THAT'S GOING TO PLUG IN AND
25 WHY IT'S NECESSARY TO ORACLE'S CASE. SO --

1 **MS. HURST:** MY FEAR IS ABOUT WHAT GOOGLE IS GOING TO
2 DO IN RESPONSE TO ORACLE'S CASE RIGHT NOW MORE THAN ORACLE'S
3 PRODUCTION, YOU KNOW, THE STUFF THAT ORACLE AFFIRMATIVELY --
4 WHERE WE ARE NOW. SO --

5 **THE COURT:** LET'S DO A QUICK TURN AROUND. HOW
6 QUICKLY CAN YOU GET SOMETHING BACK TO THE COURT?

7 **MS. HURST:** TOMORROW AT NOON?

8 **MR. VAN NEST:** OH, NO, I DON'T THINK SO. I THINK IT
9 WOULD TAKE A LITTLE LONGER THAN THAT.

10 **THE COURT:** IT'S GOING TO BE A QUICK TURNAROUND.

11 **MR. VAN NEST:** CAN WE DO IT BY -- MONDAY IS A -- CAN
12 WE DO IT BY SOMETIME ON TUESDAY SO I HAVE TIME TO CONSULT WITH
13 GOOGLE AND FIGURE OUT WHAT WE HAVE AND DON'T HAVE?

14 **THE COURT:** YOU ALL HAVE PHALANXES OF LAWYERS WORKING
15 ON THIS. AND THIS IS A JUDGE ALSUP CASE, AND I KNOW YOU'VE
16 GOT DEADLINES, AND SO THIS NEEDS TO MOVE QUICKLY.

17 I'M GOING TO ASK YOU TO CONTACT YOUR CLIENT, MR. VAN NEST,
18 ON THIS RIGHT AWAY AND GET SOMETHING TOGETHER BY -- WHAT IS
19 THE CLOSE OF DISCOVERY?

20 **MS. HURST:** IT'S CLOSED.

21 **THE COURT:** SORRY. OF --

22 **MS. HURST:** OF EXPERT DISCOVERY?

23 **THE COURT:** YES.

24 **MS. HURST:** WITH THE DR. CURL DISCOVERY, IT'S
25 MID-MARCH, YOUR HONOR.

1 **MR. VAN NEST:** YEAH, IT'S MID-MARCH. AND THERE ARE
2 NO DEPOS SCHEDULED UNTIL THE END OF THIS MONTH.

3 **MS. HURST:** WE ARE TRYING TO FINISH UP FACT
4 DISCOVERY, YOUR HONOR. AND WE DO HAVE A DEADLINE THAT CAME
5 OUT OF RESOLVING THE OTHER MOTIONS FOR DOING THAT. AND
6 THERE'S A WHOLE 'NOTHER DEPOS THAT NEED TO BE SCHEDULED
7 BASICALLY NEXT WEEK.

8 SO IF WE CAN GET THIS RESOLVED, THEN WE CAN WRAP THAT IN
9 AND BE DONE. ONE MORE AND THEN WE'RE DONE.

10 **MR. VAN NEST:** SO WHAT I PROPOSE, YOUR HONOR, WAS
11 SOMETIME ON TUESDAY.

12 **THE COURT:** ARE YOUR FOLKS NOT WORKING THIS WEEKEND?

13 **MR. VAN NEST:** PROBABLY NOT.

14 **THE COURT:** REALLY.

15 **MR. VAN NEST:** PROBABLY NOT.

16 **THE COURT:** 9:00 O'CLOCK ON TUESDAY MORNING HAVE
17 SOMETHING TO THE COURT. OKAY?

18 **MR. VAN NEST:** OKAY.

19 **MS. HURST:** THANK YOU, YOUR HONOR.


20 **MR. VAN NEST:** THANK YOU.

21 **THE COURT:** THANK YOU.

22 (PROCEEDINGS CONCLUDED AT 1:03 P.M.)
23
24
25

CERTIFICATE OF REPORTER

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE
UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY
CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

SATURDAY, JANUARY 16, 2016